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PROPERTY—THE LIMITS OF EQUITY: FORFEITURE, DOUBLE JEOPARDY, AND THE MASSACHUSETTS "SLAYER STATUTE"

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> *Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment.*[1]

INTRODUCTION

In December 2002 the Massachusetts legislature approved a law entitled "Taking from deceased victim's estate prohibited."[2] This law prohibits any person convicted of the unlawful killing of another from taking through distribution and disposition from the victim's estate.[3] To achieve this goal, the drafters employed the legal fiction that the person convicted of unlawfully killing the decedent is deemed to have predeceased the victim.[4] The statute applies this fiction for property held between the convicted killer and the decedent in joint tenancy or in tenancy by the entirety as well as to property inheritable by will or intestacy.[5]

This law, which became effective on March 24, 2003, is the most recent legislative expression of the "slayer rule."[6] The slayer rule, based on the equitable principle that individuals should not profit from their wrongful acts, bars a slayer from taking the property of his victim or benefitting in any way from his victim's premature death.[7]

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1. N. Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

2. An Act Relative to the Descent and Distribution of Property, ch. 420, 2002 Mass. Acts 1195, 1196-97 (codified at MASS. GEN. LAWS ch. 265, § 46 (2006)).

3. *Id.*

4. *See id.*

5. *Id.*

6. The "slayer rule" is the name given to the equitable common law maxim that "[n]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong" when it is applied to murderers. The most famous expression of the slayer rule is in *Riggs v. Palmer*, 22 N.E. 188, 190 (N.Y. 1889).

7. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.4 (2003).

In 2002 Massachusetts was one of the last states to weigh in on the slayer issue statutorily.[8] Although the Massachusetts statute is similar to other state provisions attempting to address the problem of the slayer and his bounty, the approach taken by Massachusetts differs markedly in one key respect.[9] Deeming murderous joint tenants and tenants by the entirety to have legally predeceased the decedent implicates constitutional concerns that other states have carefully avoided for more than a century.[10] As applied to joint tenancies and tenancies by the entirety, the Massachusetts slayer statute is overinclusive in relation to its purported goal of preventing a felon from profiting from a crime and results in an impermissible forfeiture of the estate as a result of a criminal conviction. Moreover, due to the clear punitive character of such a divestiture, the statute also violates the bar against double jeopardy guaranteed under the Fifth[11] and Fourteenth[12] Amendments to the United States Constitution, as well as the Massachusetts Declaration of Rights.[13]

This Note analyzes the ways in which the Massachusetts statute is a drastic departure from other state's slayer statutes.[14] It identi-

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8. *See id.* § 8.4 reporter's note (listing forty-four states that had some form of slayer statute in place before Massachusetts enacted its law in 2002).

9. The Massachusetts statute's de facto requirement of forfeiture of vested interests, while not without precedent, has been nearly unanimously rejected. *See* William M. McGovern, Jr., *Homicide and Succession to Property*, 68 MICH. L. REV. 65, 86 (1969) ("All authorities agree . . . that the murderer should be allowed to keep whatever right he may have during his lifetime to the income from the property, since that interest is not acquired because of the crime.").

10. *See generally* John W. Wade, *Acquisition of Property by Willfully Killing Another—A Statutory Solution*, 49 HARV. L. REV. 715 (1936).

11. U.S. CONST. amend. V ("[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . .").

12. *Id.* amend. XIV, § 1; Benton v. Maryland, 395 U.S. 784, 794 (1969) (holding that the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution incorporated the Double Jeopardy Clause of the Fifth Amendment and made it enforceable against the states).

13. Luk v. Commonwealth, 658 N.E.2d 664, 666 n.3 (Mass. 1995) ("Although not expressly included in the Massachusetts Declaration of Rights, the prohibition against double jeopardy has long been recognized as part of our common and statutory law."); *see also* MASS. CONST. pt. 1, art. XII ("[N]o subject shall be arrested, imprisoned, despoiled, or *deprived of his property*, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land." (emphasis added)).

14. Since adoption of the Massachusetts statute, the North Dakota legislature amended its analogous statute to void the vested property interests of joint tenants convicted of an unlawful killing. *See* N.D. CENT. CODE ANN. § 30.1-10-03(3) (Supp. 2007) ("The intentional and felonious killing of the decedent . . . (b) Voids the interests of the killer in property held with the decedent at the time of the killing as joint tenants

fies the ways in which the statute differs and concludes that these differences violate rights guaranteed by the Massachusetts and United States Constitutions. As drafted, the Massachusetts statute goes far beyond the traditional goal of the slayer rule—preventing the perpetrator of a crime from acquiring his victim's property.[15] Rather, when applied to joint tenants and tenants by the entirety, it divests a perpetrator of property in which he has a vested and preexistent legal interest.[16] In passing such a law, the drafters ignored more than a century of case law from other jurisdictions that carefully balanced the need to honor the interests that citizens have in their property with the indisputable moral justification for denying slayers the right to succeed to their victims' property.[17] As such, the legislature was uninfluenced by the historical understanding that it is both unconscionable to allow a slayer to profit from his wrongful acts *and* unconstitutional to take away from the slayer any property interest that he already owns without due process of law.[18]

Part I of this Note presents the roots of the slayer quandary from the ancient common law writs of attainder through the early American abolition of the slayer rule. Part II reviews the first common law approaches to the slayer problem and the modern-day controversy regarding the constitutionality of slayer statutes. Part III considers the response taken by state legislatures, in the face of perceived inaction by the courts, to protect victims of crimes and

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with the right of survivorship."). While no appellate court has had the opportunity to scrutinize the new law, this move has been criticized by at least one commentator. *See generally* Bradley Myers, *The New North Dakota Slayer Statute: Does It Cause a Criminal Forfeiture?*, 83 N.D. L. REV. 997 (2007).

15. "*Nullus commodum capere potest de injuria sua propria*," the common law equitable maxim that no one shall be allowed to profit by his own wrong, is the organizing principle behind nearly all slayer rules and statutes. HERBERT BROOM, A SELECTION OF LEGAL MAXIMS 279 (Philadelphia, T. & J. W. Johnson & Co. 1882) (1845); *see also* Estate of Foleno *ex rel.* Thomas v. Estate of Foleno, 772 N.E.2d 490, 494 (Ind. Ct. App. 2002); Neiman v. Hurff, 93 A.2d 345, 347 (N.J. 1952); Riggs v. Palmer, 22 N.E. 188, 190 (N.Y. 1889); Gedlen v. Safran (*In re* Estate of Safran), 306 N.W.2d 27, 29 (Wis. 1981); Wade, *supra* note 10, at 715.

16. This directly contradicts the widely recognized principle that under a constitutional slayer statute "the murderer will not be deprived of property to which he would otherwise be entitled"; he simply "will not be entitled to profit by the murder." RESTATEMENT (FIRST) OF RESTITUTION: QUASI CONTRACTS & CONSTRUCTIVE TRUSTS § 188 cmt. a (1937).

17. Wade, *supra* note 10, at 725-26. In his very influential early model slayer statute Professor Wade made clear that "[e]ach state will also find it necessary to consider the exact nature of the interests which it is including. If the interest is one which has already vested, it cannot be taken away without violating the constitutional provisions as to forfeiture of estates." *Id.*

18. *Id.*

their heirs. This Part also examines the relevance of the right of survivorship that characterizes joint tenancies and tenancies by the entirety, and explains why these types of estates have presented particular problems for legislatures seeking to advance equitable ends. Part III concludes by surveying the different state and judicial approaches to the slayer rule in the context of these more difficult types of property interests, as well as model solutions contained in the *Uniform Probate Code*[19] and the *Restatement of Restitution*.[20] Part IV examines the construction of the Massachusetts slayer statute, and Part V analyzes the vulnerability of Massachusetts's approach to constitutional challenges.

I. HISTORICAL ROOTS OF THE SLAYER ISSUE

A. *Feudalism and Bills of Attainder: Forfeiture of Estate, Corruption of Blood, and Civil Death*

At ancient common law, any ability of a killer to inherit from his victim was precluded by operation of law through the doctrine of attainder.[21] Under this doctrine, a person convicted of a capital offense, including murder, was placed into a state of attainder as an immediate consequence of his conviction.[22] The consequences of such placement included forfeiture of the guilty person's property to the King and corruption of the perpetrator's blood.[23] The doctrine of forfeiture required the complete divestiture of a wrongdoer's real and personal property and was considered part of the punishment for the offense committed.[24] Corruption of blood was a feudal doctrine that transferred the condemnation of the attained person to his heirs, "unto the remotest generation."[25] The effect of this intergenerational condemnation was that a wrongdoer was pre-

19. UNIF. PROBATE CODE § 2-803 (amended 1997), 8 U.L.A. 58-59 (Supp. 2008).

20. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.4 (2003).

21. Alison Reppy, *The Slayer's Bounty—History of Problem in Anglo-American Law*, 19 N.Y.U. L.Q. REV. 229, 241 (1942) (noting that prior to the rejection of criminal forfeitures, "the doctrine of attainder, forfeiture, corruption of blood and escheat . . . constituted a fairly satisfactory . . . solution to the problem of the slayer and his bounty").

22. *Id.* at 231.

23. *Id.*

24. *Id.* at 232-33.

25. *Id.* at 233. Corruption of blood was part of the ancient English penalty for a felony. *Id.* The corruption of blood would forbid the accused's family from inheriting his property. *Id.* Such bills and punishments were often inflicted upon Tories by the colonial government immediately following independence. *See, e.g.*, United States v. Brown, 381 U.S. 437, 441-42 (1965).

vented from conveying, and his heirs from taking, any property through descent or distribution.[26] The doctrine of attainder, while certainly cruel, made moot the social, ethical, and legal concerns raised when a person kills another and stands to inherit from his victim.[27] A person who can neither hold, nor devise, nor inherit property is incapable of profiting, vis-á-vis inheritance of property, from his wrong.

B. *Early American Jurisprudence: The Abolition of Attainder and the Emergence of the "Slayer Problem"*

Regardless of their rarified salutary effect, these doctrines fell out of favor in Anglo-American jurisprudence and, over time, were increasingly rejected as undemocratic and archaic features of a feudal past.[28] In the United States,[29] the attendant conditions of attainder were abolished by the Constitution of 1789.[30] Explicit prohibitions were also included in the majority of state constitutions.[31] While the injustices of attainder were unquestionable and

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26. Reppy, *supra* note 21, at 234 ("[A] person attainted is neither allowed to retain his former estate nor to inherit a future one, nor to transmit any inheritance to his issue . . . for his inheritable blood, which is necessary either to hold, [or] to take . . . is blotted out, corrupted and extinguished forever . . . ." (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES *255)).

27. *Id.* at 238 (noting a near complete absence of case law discussing the issue of the slayer and his bounty prior to the statutory abolition of attainder).

28. *Id.* at 234 (observing the connection between the breakdown of feudal power and a growing ill regard towards the consequences of attainder).

29. *See id.* at 234-38.

30. *Id.* at 244; *see, e.g.*, U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."); *id.* art. III, § 3, cl. 2 ("The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted."). It is important to note that some of the colonies, including Massachusetts, had expressly abrogated these doctrines well before the 1787 signing of the U.S. Constitution. Cecil Greek, *Drug Control and Asset Seizures: A Review of the History of Forfeiture in England and Colonial America*, *in* DRUGS, CRIME, AND SOCIAL POLICY: RESEARCH, ISSUES, AND CONCERNS 109, 119 (Thomas Mieczkowski ed., 1992) (noting that "Massachusetts abolished escheats and forfeiture consequent to attainder in its 'The Body of Liberties of 1641'").

31. *See, e.g.*, ALA. CONST. art. I, § 19; ALASKA CONST. art. I, § 15; ARIZ. CONST. art. 2, § 16; CAL. CONST. art. I, § 9; COLO. CONST. art. II, § 9; CONN. CONST. art. IX, § 4; DEL. CONST. art. I, § 15; FLA. CONST. art. I, § 17; GA. CONST. art. I, § 1, ¶ XX; ILL. CONST. art. I, § 11; IND. CONST. art. I, § 30; KAN. CONST. Bill of Rights, § 12; KY. CONST. Bill of Rights, § 20; ME. CONST. art I, § 11; MD. CONST. Dec. of Rights art. 27; MICH. CONST. art. I, § 10; MINN. CONST. art. I, § 11; MO. CONST. art. I, § 30; MONT. CONST. art. II, § 30; NEB. CONST. art. I, §§ 15-16; N.C. CONST. art. I, § 29; OHIO CONST. art I, § 12 ; OKLA. CONST. art. II, § 15; OR. CONST. art. I, § 25; PA. CONST. art. I, §§ 18-19; S.C. CONST. art. I, § 4; TENN. CONST. art. I, § 12; TEX. CONST. art. I, § 21; WASH. CONST. art. I, § 15; W. VA. CONST. art. III, § 18; WIS. CONST. art I, § 12.

the necessity of protection from those injustices was evident,[32] the abolition of the doctrines of attainder, forfeiture, and corruption of blood made it possible for a killer to inherit from his victim.[33]

This result is largely attributable to the fact that descent and distribution were exclusively controlled by operation of property law.[34] While inheritance through murder committed by one who stands to take property from the victim "is repugnant to all sense of justice,"[35] the law of property has no inherent protections against this eventuality.[36] Moreover, the law of inheritance in the United States tends to be statutory, and a strict construction of early inheritance statutes explicitly providing the mechanisms for descent and distribution actually precluded any result other than allowing a killer to take.[37]

This conflict between law and equity has been variously referred to as the problem of the "slayer and his bounty"[38] or the problem of the "murderous heir."[39] For the purpose of this Note, it shall simply be referred to as the slayer problem. Various solutions

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32. ZECHARIAH CHAFEE, JR., THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787, at 97 (1956) (regarding as fortunate that an "indulgent attitude" toward Blackstone's blasé attitude toward the injustices of attainder "was not shared by the Philadelphia Convention").

33. *See* Estate of Foleno *ex rel.* Thomas v. Estate of Foleno, 772 N.E.2d 490, 494 (Ind. Ct. App. 2002) (noting that, although cruel, attainder "provided one unintended benefit: separating a killer from his victim's property," and that its abolition left "an unanticipated void").

34. HERBERT THORNDIKE TIFFANY, THE LAW OF REAL PROPERTY AND OTHER INTERESTS IN LAND § 623, at 560 (Renard Berman ed., Callaghan & Co. abr. 3d ed. 1970) (1903).

35. Wade, *supra* note 10, at 715.

36. TIFFANY, *supra* note 34 (noting that under traditional property law, "[t]he devisee or heir [who commits murder] is generally allowed to take [from his victim] as in any other case").

37. Under a strict constructionalist approach, an equitable solution that undermined the operation of existing statutes would be verboten because such action would be a judicial preemption of expressed legislative will. *See* Riggs v. Palmer, 22 N.E. 188, 191 (N.Y. 1889) (Gray, J., dissenting). Judge Gray, in his dissenting opinion, stated that

> [w]e are bound by the rigid rules of law, which have been established by the legislature, and within the limits of which the determination of this question is confined. The question we are dealing with is whether a testamentary disposition can be altered, or a will revoked, after the testator's death, through an appeal to the courts, when the legislature has by its enactments prescribed exactly when and how wills may be made, altered, and revoked, and apparently, as it seems to me, when they have been fully complied with, has left no room for the exercise of an equitable jurisdiction by courts over such matters.

Id.

38. *See* Reppy, *supra* note 21, at 229.

39. *See* Daniel A. Farber, *Courts, Statutes, and Public Policy: The Case of the Murderous Heir*, 53 SMU L. REV. 31 (2000).

to the slayer problem have been offered by courts and legislatures as well as by commentators[40] and the American Law Institute.[41] These approaches will be discussed in Parts II and III.

II. COMMON LAW ANALYSIS OF THE SLAYER PROBLEM

A. *Early Judicial Conservatism and Reluctance to Take a Lead*

A substantial number of early decisions addressing the slayer problem upheld the ability of a slayer to take from his victim through descent and distribution.[42] Courts, with varying degrees of regret and apprehension, held that under existing statutory schemes, a slayer was entitled to take as in any other case.[43] Conscious of the threat of unchecked punitive forfeitures that could result from depriving a person, even a convicted murderer, of his property for commission of a crime, courts avoided this possibility by adopting a conservative and textualist approach in deciding these early cases.[44] Indeed, there were a number of reasons underlying this conservative approach. In addition to a desire to avoid the troublesome constitutional forfeiture issues that would be raised by denying a slayer's right to inherit,[45] courts were reluctant to use their equitable powers to override statutes that clearly and unambiguously expressed legislative intent relating to wills and to descent.[46] Moreover, courts refused to deny a slayer his ability to

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40. *See generally* Wade, *supra* note 10.

41. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.4 (2003); UNIF. PROBATE CODE § 2-803 (amended 1997), 8 U.L.A. 58-59 (Supp. 2008).

42. 5 HERBERT THORNDIKE TIFFANY, THE LAW OF REAL PROPERTY § 1378, at 220 (Basil Jones ed., Callaghan & Co. 3d ed. 1939) (1920).

43. *See id.*; *see also* Wall v. Pfanschmidt, 106 N.E. 785, 790 (Ill. 1914) (In light of unambiguous statutes, "whether [the ordinary application of the laws of descent] accords with natural right and justice is not for the courts to decide."); McAllister v. Fair, 84 P. 112, 115 (Kan. 1906) (admitting that while impermissible, "a theory cutting a murderer out of any benefits resulting from his crime appeals to the court's sense of justice").

44. *See* 5 TIFFANY, *supra* note 42, § 1378, at 220; J. David Walsh, Note, *Decedents' Estates–Forfeitures of Property Rights by Slayers*, 12 WAKE FOREST L. REV. 448, 460-61 (1976).

45. Walsh, *supra* note 44, at 460-61; *see also McAllister*, 84 P. at 113 (It is not "easy to attribute to the Legislature an intention to take from a criminal the right to inherit as a consequence of his crime, since the Constitution provides that no conviction shall work a corruption of blood or forfeiture of estate.").

46. *See* Riggs v. Palmer, 22 N.E. 188, 191 (N.Y. 1889) (Gray, J., dissenting); 5 TIFFANY, *supra* note 42, § 1378, at 220-21.

inherit because to do so would be an additional punitive measure on top of the sentence normally given for the killing itself.[47]

B. *Riggs v. Palmer: A Common Law Attempt to Articulate an Equitable Solution*

The first attempt to directly confront these issues and fill this equitable void was not made until the end of the nineteenth century.[48] *Riggs v. Palmer* was the first, and certainly the most influential, court decision in the United States attempting to equitably solve the slayer problem by use of the common law.[49]

In *Riggs*, a grandson killed his grandfather by poisoning him.[50] Upon his grandfather's death, the murderous grandson stood to inherit through his victim's will.[51] In this case, the sole issue faced by the court was whether or not the grandson could have his inheritance.[52] At the outset of its analysis, the court recognized that, unless the effect could in some way be "controlled or modified," a literal construction of the applicable state probate statutes would deliver the property to the grandson.[53] Eschewing both precedent and controlling canons of statutory construction, grounding its analysis in the works of Bacon and Blackstone, and looking to Aristotle for Latin roots, the court found that an "equitable construction" of the existing statutes could serve as just such a means of modification.[54] Justice Earl, speaking for the majority, dispensed with the issues of legislative provincialism by concluding that, since the legislature could not have intended the result compelled by the existing statutes, such a result could be excluded.[55] Thus, equitable con-

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47. 5 TIFFANY, *supra* note 42, § 1378, at 221; *see also Wall*, 106 N.E. at 789-90 (noting that the punishment for murder is fixed in the criminal code and does not include a forfeiture of the right to inherit and, therefore, holding that it is not for the court to impose such a penalty).

48. Reppy, *supra* note 21, at 245-50. Actually, this attempt fell quite early in the controversy. *See* Farber, *supra* note 39, at 33 (explaining that while it may seem surprising, the issue of the slayer's ability to inherit from his victim was never addressed by the courts until shortly before the *Riggs* case in 1889).

49. *Riggs*, 22 N.E. 188.

50. *Id.* at 189.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* (citing 9 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW (Phila., Thomas Davis 1846); 1 WILLIAM BLACKSTONE, COMMENTARIES *91); *see also id.* (quoting BACON, *supra*, at 248 ("By an equitable construction a case not within the letter of a statute is sometimes holden to be within the meaning, because it is within the mischief for which a remedy is provided." (internal quotation marks omitted)).

55. *Id.* at 190.

struction of existing statutes would allow the court to effectively bypass those provisions that demanded a seemingly unjust result.[56]

Now, no longer "troubled by the general language contained in the laws,"[57] the *Riggs* court was free to implement the second tier of its analysis—to articulate a more equitable solution to the slayer problem. It did so by invoking the common law maxim that "[n]o one should be permitted to profit by his own . . . wrong."[58] The court made much of what it saw as the nearly transcendent legal force of this maxim, reasoning that no statute was needed to give it force.[59] In support of this proposition, the court pointed to an application of this maxim by the United States Supreme Court in its decision in *New York Mutual Life Insurance Co. v. Armstrong*.[60] In that unanimous decision, the Court held that a beneficiary who murdered the insured forfeited all rights to collect under an insurance policy.[61] In so deciding, Justice Field stated that "[i]t would be a reproach to the jurisprudence of the country" to allow the principle underlying this maxim to be violated.[62] Permitting a slayer to succeed to the property, the *Riggs* court reasoned, would be analogous to allowing an arsonist to collect on a fire insurance contract.[63] Preventing this outcome through the application of a common law maxim would be merely akin to the nullification of a will for fraud.[64] The appropriate result was clear to the court—if the demands of equity are to be heeded, the grandson must be barred from taking under his grandfather's will.[65]

In the third prong of its analysis, the court, rather summarily, dispensed with concerns that denying the slayer succession would either submit him to a greater punishment than the law specified or

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56. *Id.*

57. *Id.*

58. The full weight of the court's rationale is clear from its complete language:

> [A]ll laws, as well as all contracts, may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes.

Id.

59. *Id.*

60. N.Y. Mut. Life Ins. Co. v. Armstrong, 117 U.S. 591, 600 (1886).

61. *Id.* at 600.

62. *Riggs*, 22 N.E. at 190 (citing *Armstrong*, 117 U.S. at 600).

63. *Id.*

64. *Id.*

65. *Id.* (invalidating the will as void).

work a forfeiture for a crime.[66] The majority stated that its decision "does not inflict . . . any greater or other punishment for his crime than the law specifies. It takes from him no property, but simply holds that he shall not acquire property by his crime . . . ."[67]

In a passionate dissent, Justice Gray argued that the majority drastically overstepped its proper judicial role.[68] Focusing on the primacy of the legislature, he argued that "the courts are not empowered to institute such a system of remedial justice."[69] Additionally, he claimed that any bar to property is an additional criminal punishment impermissibly doled out by the court.[70]

In the final analysis, the influence of the *Riggs* court's solution to the slayer problem has likely been more inspirational than precedential.[71] The reasoning in *Riggs*—in particular the "equitable construction" upon which the majority bases the first prong of its decision—has been attacked by many commentators.[72] Indeed, after the *Riggs* decision, courts in many jurisdictions dismissed the majority's holding as impermissible legislation by the courts.[73] On this issue, the dissent's focus on the primacy of the legislature was ultimately more resonant.[74] Nevertheless, the majority's expression

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66. *Id.*

67. *Id.*

68. *Id.* at 191-92 (Gray, J., dissenting).

69. *Id.* at 192.

70. *Id.* at 193 (writing that the courts are barred from "enhanc[ing] the pains, penalties, and forfeitures provided by law for the punishment of crime").

71. Gregory C. Blackwell, Comment, *Property: Creating a Slayer Statute Oklahomans Can Live With*, 57 OKLA. L. REV. 143, 148 (2004) ("*Riggs* triggered the question of what to do with a slayer and his bounty . . . . [Yet, i]n the myriad of slayer cases that followed *Riggs*, only a few jurisdictions followed New York's lead.").

72. Reppy, *supra* note 21, at 251 (arguing that the "reasoning of Judge Earl has been severely criticized and cannot be supported"); *see also* Farber, *supra* note 39, at 33. Farber argues that the *Riggs* decision was made with the absence of controlling precedent. *Id.* While the court cited the Supreme Court's decision in *Armstrong* to bolster its argument that the force of common law maxims can carry the day, they did so without mentioning either that the issue raised in *Armstrong* was essentially one of contract law or that the case was decided in the absence of an applicable statute and was therefore a case purely applying common law. *Id.* at 34.

73. Julie J. Olenn, Comment, *'Til Death Do Us Part: New York's Slayer Rule and* In re Estates of Covert, 49 BUFF. L. REV. 1341, 1345-46, 1346 n.21 (2001). This is not to say that the *Riggs* majority stood completely alone. *See* Wade, *supra* note 10, at 716 n.12 (observing that a "respectable" minority of courts also found a way to prevent title from passing to the slayer).

74. *See* McAllister v. Fair, 84 P. 112, 113 (Kan. 1906) ("[T]he function of changing a law because it works unjustly or oppressively belongs to the Legislature, and for a court to ingraft an exception upon a statute would be judicial legislation."); Shellenberger v. Ransom, 59 N.W. 935, 941 (Neb. 1894) (rejecting the decision in *Riggs* as a "manifest assertion of a wisdom believed to be superior to that of the legislature upon a

of what has become known as the "slayer rule"[75] has been undeniably influential in American jurisprudence.[76] This maxim has become the overarching organizing principle for legislatures throughout the country to attempt their own solutions to the slayer problem.[77]

III. THE RESPONSE OF STATE LEGISLATURES

Throughout the common law controversy surrounding the slayer problem, many courts, especially those declining to disregard existing statutes for the sake of equitable principles, suggested that a statutory solution may be possible.[78] A statutory solution to the slayer problem is appealing because it renders moot the "unwarranted judicial legislation" concerns of the *Riggs* dissent and other courts.[79] Obviation of this portion of the controversy alone would seem to make a legislative solution desirable.[80] Indeed, state legislatures immediately began to accept these invitations when offered,[81] or to respond to judicial inaction when they were not,

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question of policy"); *In re* Carpenter's Estate, 32 A. 637, 638 (Penn. 1895) (noting that the *Riggs* case was decided by a divided court and following the dissent in stating that evil consequences of a law "can only be avoided by a change of the law itself, to be effected by legislative, and not judicial, action").

75. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.4 (2003) (the equitable principle that slayers should not profit from their own wrongful acts).

76. *See* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 41 (1921); *see also* Anthony D'Amato, *Elmer's Rule: A Jurisprudential Dialogue*, 60 IOWA L. REV. 1129, 1129 (1975) (observing that Justice Cardozo wrote of the *Riggs* case that "two analytical paths pointed in different directions and the judges selected the path that seemed better to lead to 'justice'").

77. Wade, *supra* note 10, at 716.

78. Eversole v. Eversole, 185 S.W. 487, 489 (Ky. 1916) ("If a change in that policy is desired, application must be made to the Legislature, and not to the judiciary, whose function it is to declare the law, but not to make it."); *see also* McGovern, Jr., *supra* note 9, at 106 (noting that "[m]ost courts in this country have assumed that any rules on the subject must come from the legislature"); Reppy, *supra* note 21, at 263-64; Wade, *supra* note 10, at 716.

79. Wade, *supra* note 10, at 718. Wade takes the view that a statutory approach has fewer vulnerabilities because "in view of the fact that [equitable judicial engrafting] . . . is so unprecedented and extraordinary, a statute which would relieve the situation and reach the same result by a more customary and authoritative method is to be desired." *Id.*

80. *Id.* at 720 (concluding "that in the vast majority of the states a statute adequately covering the problem is needed").

81. Reppy, *supra* note 21, at 263-64 ("The earliest case to suggest a statutory solution of the problem was *Owens v. Owens* in 1888, and this suggestion resulted in the enactment of a statute by the North Carolina Legislature the following year." (footnote omitted) (citing Owens v. Owens, 6 S.E. 794 (N.C. 1888))).

passing statutes that sought to solve the slayer problem once and for all.[82] Within a short time after the *Riggs* decision, the slayer problem had been addressed by statute in nearly half of all state jurisdictions.[83]

Once states began to pass statutes en masse, two potential flaws in these statutes were revealed. First, the failure of state legislatures to be comprehensive in their drafting resulted in statutes that were underinclusive and allowed slayers to continue to profit in certain rarified situations.[84] Second, and at the other end of the spectrum, were states that passed overinclusive statutes that divested slayers of property beyond what they stood to gain from their unlawful act.[85]

A. *The Problem of Underinclusiveness: Legislative Failure to Draft Comprehensive Statutes Resulting in Inapplicability to Particular Property Interests*

Poor drafting sometimes resulted in statutes that were underinclusive.[86] It has been observed that much of the early legislation aimed at addressing the slayer problem was not entirely successful because it was not sufficiently comprehensive to provide for all of the possible factual permutations surrounding murderers and their victims.[87] Many statutes only barred slayers succeeding to property by means of will or intestacy.[88] In doing so, they failed to provide for the property inheritable by slayers by other means such as dower,[89] elective share,[90] and the right of survivorship.[91] This lack

82. Wade, *supra* note 10, at 716 ("[I]n most of the jurisdictions in which the courts refused to engraft an exception a statute rectifying the omission was passed shortly thereafter.").

83. *Id.* at 721 (noting that "23 states and the District of Columbia" had, by the mid-1930s, "passed acts which cover the [slayer] subject with varying degrees of completeness").

84. *See infra* Part III.A.

85. *See infra* Part III.B.

86. *See* Reppy, *supra* note 21, at 264.

87. *Id.*

88. *See, e.g.*, KAN. STAT. ANN. § 59-513 (2005).

89. *See, e.g.*, Eversole v. Eversole, 185 S.W. 487, 489 (Ky. 1916) (slayer allowed to claim dower rights).

90. *See, e.g.*, Long v. Kuhn (*In re* Kuhn's Estate), 101 N.W. 151, 153 (Iowa 1904) (slayer allowed to claim elective share).

91. *See, e.g.*, Woodson v. Foster (*In re* Estate of Foster), 320 P.2d 855, 860 (Kan. 1958) (construing the predecessor to section 59-513 of the Kansas Statutes and holding that the language "or otherwise" that followed specific language preventing the taking as an heir or by will was insufficient to extend such a bar to cover joint tenants with a right of survivorship).

of comprehensiveness, coupled with the *expressio unius* canon of statutory construction,[92] resulted in courts refusing to extend bars to succession to property in which a slayer might equitably be prevented from taking.[93] While these early missteps did nothing to lessen the recognition that statutory development in this area was desirable,[94] they did make clear that a carefully drafted, comprehensive statute would be necessary to avoid the piecemeal application of prior attempts at a common law solution.[95]

B. *The Problem of Overinclusiveness and the "Owned Interest Rationale" as a Means of Addressing such Concerns*

A second, potentially more problematic flaw that became apparent in early slayer statutes involved their constitutionality.[96] The most immediate objection to slayer statutes was that they violated the prohibitions against corruption of blood and forfeiture of estate contained in the federal and most state constitutions.[97] Such concerns were first articulated in those early decisions that refused to apply the slayer rule at common law.[98] Courts kept a wide berth from this possibility in applying the common law. Yet when construing new statutes preventing acquisition of property by slayers,

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92. *Expressio unius est exclusio alterius* is the Latin phrase meaning "the express[ion of] one item of a[n] . . . associated group or series excludes another left unmentioned." United States v. Vonn, 535 U.S. 55, 65 (2002).

93. This pattern of effective underinclusiveness can be seen in a number of jurisdictions. *See, e.g.*, Wenker v. Landon, 88 P.2d 971, 975 (Or. 1939), *overruled in part by* Hargrove v. Taylor, 389 P.2d 36, 37 (Or. 1964) (construing as insufficient for extension the language "or receive any interest . . . as surviving spouse"); Beddingfield v. Estill, 100 S.W. 108, 111 (Tenn. 1907) (same result construing the language "take . . . otherwise").

94. Wade, *supra* note 10, at 716.

95. *See, e.g.*, N.Y. Mut. Life Ins. Co. v. Armstrong, 117 U.S. 591, 600 (1886) (life insurance); Riggs v. Palmer, 22 N.E. 188, 191 (N.Y. 1889) (wills); Owens v. Owens, 6 S.E. 794, 795 (N.C. 1888) (dower); *Beddingfield*, 100 S.W. at 111 (right of survivorship).

96. Wade, *supra* note 10, at 720 (Observing that once the desirability of a statutory approach is conceded the pertinent question becomes: "would such a statute be constitutional?").

97. *Id.*; *see also* U.S. CONST. art. III, § 3 ("[N]o Attainder . . . shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.").

98. 5 TIFFANY, *supra* note 42, § 1378; *see also* Wall v. Pfanschmidt, 106 N.E. 785, 790 (Ill. 1914) (refusing to bar a slayer from inheriting because the Constitution contains "clear and unequivocal declarations of the public policy of this state to the effect that no forfeiture of property rights shall follow conviction for crime" (quoting Collins v. Metro. Life Ins. Co., 83 N.E. 542, 543 (Ill. 1907))); McAllister v. Fair, 84 P. 112, 113 (Kan. 1906) ("[It is not] easy to attribute to the Legislature an intention to take from a criminal the right to inherit as a consequence of his crime, since the Constitution provides that no conviction shall work a corruption of blood or forfeiture of estate.").

they more frequently endorsed the view of the *Riggs* majority that denial of succession is not a forfeiture because it "takes from [a slayer] no property," but merely prevents her from acquiring property by her crime.[99] This is evidenced by the fact that direct constitutional attacks on slayer statutes in the early statutory period were exceedingly rare,[100] and more often than not, the constitutionality of statutes was impliedly assumed.[101]

The idea that constitutional prohibitions against forfeiture are not triggered in cases where a slayer had only an expectancy interest has been referred to as the "owned interest" rationale.[102] This has been, and remains, the "most popular rationale" to shield slayer statutes from constitutional attack.[103] While the owned interest rationale has been criticized as perhaps too formalistic to form the basis for constitutional distinctions,[104] its basic tenet—that a mere expectancy interest cannot form the basis for a claim of forfeiture—has become generally accepted in the analysis of slayer statutes. That tenet can be expressed in the following syllogism: a slayer cannot be considered to have forfeited that which she does not own; one who stands to inherit by will or intestacy does not own, prior to probate, what she expects to inherit; therefore, a statute that merely bans a slayer from *acquiring* property through the probate code cannot be considered a forfeiture.[105]

In addition to claims of unconstitutional forfeiture, the owned interest rationale shields slayer statutes from other constitutional

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99. Perry v. Strawbridge, 108 S.W. 641, 648 (Mo. 1908) ("There is no forfeiture of an estate" when a slayer has simply been barred "from acquiring property in an unauthorized and unlawful way, i.e., by murder."); *Riggs*, 22 N.E. at 190.

100. Wade, *supra* note 10, at 721. Wade notes that by the mid-1930s, only one case had directly attacked the constitutionality of a slayer statute, and even then, "it was easily upheld." *Id*; *see also* Hamblin v. Marchant, 175 P. 678 (Kan. 1918), *aff'd*, 180 P. 811 (Kan. 1919).

101. *See* Wilson v. Bates, 231 S.W.2d 39, 41 (Ky. 1950).

102. Mary Louise Fellows, *The Slayer Rule: Not Solely a Matter of Equity*, 71 IOWA L. REV. 489, 540 (1986) (explaining that according to the "owned interest" rationale, constitutional protections against "forfeiture of estate and corruption of blood apply only to property the felon owned and not to property in which the felon had only an expectancy interest").

103. *Id.* ("The owned interest rationale is the most popular rationale for upholding the slayer rule.").

104. *Id.* at 541-42 (noting the inevitability that under such a rationale "functionally similar property interests would be subject to different rules based solely on formalistic labels").

105. *See* RESTATEMENT (FIRST) OF RESTITUTION: QUASI CONTRACTS & CONSTRUCTIVE TRUSTS § 187 cmt. c (1937) ("Under the rules stated in this Section, the murderer is not deprived of property lawfully acquired by him, but is merely prevented from acquiring the beneficial interest in property through his unlawful act.").

attacks so long as a statute does not seek to deprive a slayer of a right in which she has a vested interest.[106] For example, if it is accepted that a slayer is not actually being deprived of property at all, due process protections are not violated.[107] Likewise, a statute that deprives a defendant of no *vested* property interest will likely not be considered punitive and thus will not form the basis of a double jeopardy claim.[108] The conclusion to be drawn, therefore, is that a statute that solely prevents a slayer from acquiring property from her victim and does not take any property from her is constitutional.[109] By the same token, a statute depriving a slayer of a vested property interest will be unconstitutional. Such a deprivation may be both an impermissible forfeiture and a violation of other constitutional protections, such as the prohibitions against double jeopardy.[110] Accordingly, just as a poorly drafted statute may be underinclusive for its failure "to bring all the possible cases within [its] purview,"[111] it may also be overinclusive, potentially in violation of state and federal constitutional provisions, by denying a slayer property in which she held a cognizable interest prior to the slaying.

C. *Application of the Owned Interest Rationale to More Substantial Property Interests*

Given these stakes, legal commentators and academics recognized early that a well-drafted slayer statute must carefully consider

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106. Fellows, *supra* note 102, at 721.

107. U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."); *see also* MASS. CONST. pt. 1, art. XII ("[N]o subject shall be arrested, imprisoned, despoiled, or *deprived of his property*, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land." (emphasis added)); Wade, *supra* note 10, at 721 ("[U]nless property *is taken away from the slayer* as a result of his crime, it seems impossible to say that the due process of law clause is violated." (emphasis added)).

108. Such a forfeiture would be considered civil rather than criminal and not subject to the protections of the double jeopardy clause. *See generally* J. Andrew Vines, Case Note, United States v. Ursery*: The Supreme Court Refuses to Extend Double Jeopardy Protection to Civil* in rem *Forfeiture*, 50 ARK. L. REV. 797, 805-10 (1998).

109. Wade, *supra* note 10, at 721; *see also* Hamblin v. Marchant, 175 P. 678, 679 (Kan. 1918) (holding that a slayer statute barring a wife from taking her victim-husband's estate does not violate bans of forfeiture or the Fourteenth Amendment because she "never acquired nor received anything that could be taken from her").

110. Perry v. Strawbridge, 108 S.W. 641, 648 (Mo. 1908). The court illuminated this dichotomy by stating: "The state cannot by law take a criminal's property, but it can say to every individual citizen, 'you cannot acquire property by designated unlawful means.'" *Id.*

111. Reppy, *supra* note 21, at 264.

the myriad property interests that may come into play.[112] There is little argument that the right to take by inheritance through a will (or intestacy in the absence thereof) is, before the passing of the decedent, merely an expectancy and not a vested ownership right.[113] In cases involving such clear expectancy interests, legislatures have largely employed the fiction that, for the purposes of descent and distribution, the killer is deemed to have predeceased the decedent.[114] Under the owned interest rationale, there is no real difficulty as to the constitutionality of statutes affecting those interests. However, there exist other interests that "are significantly more substantial than the right to take by intestacy [or] will" which may fall under a slayer statute.[115] Differences inherent to these more substantial property interests must be accounted for in drafting a statute lest it become unconstitutionally overinclusive.[116]

Examples of a property rights more substantial than the right to inherit by will include the accretive property interests realized through joint tenancy[117] and tenancy by the entirety.[118] These in-

112. *See generally* UNIF. PROBATE CODE § 2-803 (amended 1997), 8 U.L.A. 58-59 (Supp. 2008); Wade, *supra* note 10.

113. TIFFANY, *supra* note 34, § 172.

114. 16 Richard R. Powell, Powell on Real Property § 90.12[3][A], AT 90-154 TO -154.1 (MICHAEL ALLAN WOLF ED., LEXISNEXIS 2008) (1949) ("For the purposes of the law of intestacy, the effect of a killing is usually to treat the killer as having predeceased the victim.").

115. Fellows, *supra* note 102, at 542.

116. *See* Wade, *supra* note 10, at 725-26.

117. Joint tenancy is a form of concurrent ownership developed at common law and codified by statute in most states by which all joint tenants are considered to be a single owner of the property. TIFFANY, *supra* note 34, § 187. Four elements, or "unities," are essential for the formation of a joint tenancy: (1) the joint tenants' interest must be acquired or vest at the same time; (2) title must be granted to all in the same written instrument; (3) each joint tenant must have equal undivided shares of the property; and (4) each must have right to possession of the whole. *Id.* If these elements are satisfied, each joint tenant is, through employment of the legal fiction that all joint owners are but one owner, considered seized of the entire property. *See id.*

A necessary incident of this fiction and the outstanding characteristic of a joint tenancy is the right of survivorship. *Id.* The practical consequence of this right is that, assuming there are only two joint tenants, when one joint tenant dies, the surviving tenant owns the entire estate. *Id.* Since the joint tenants are fictitiously considered by the law to be one, nothing actually passes to the remaining joint tenant. *Id.* The remaining joint tenant simply owns individually what he already owned jointly, the deceased joint tenant's interest being extinguished by death. *Id.* A joint tenancy can be converted unilaterally, thus destroying the right of survivorship at the option of either tenant in his lifetime by a severance of the tenancy. *See, e.g.*, Riddle v. Harmon, 102 Cal. App. 3d 524 (1980). A severance may be brought about by destroying any one of the four "unities." TIFFANY, *supra* note 34, § 189. For example, a conveyance of interest by one joint tenant destroys the unity of title thus severing the tenancy and defeating the right of survivorship. *Id.*

terests have caused the most difficulty and engendered the most controversy when included without appropriate care in slayer statutes.[119] To understand how these differ from mere expectancy interests it is necessary to understand that a slayer's interest in property held jointly includes a right of survivorship that is vested at the time of the conveyance. Through the employment of the legal fiction that all joint owners are but one owner, a slayer is considered seized of the entire property from the very beginning.[120] When one joint tenant dies the surviving tenant owns the entire estate by operation of her right of survivorship.[121] Therefore, a slayer has a substantially greater interest in property held jointly with a right of survivorship, whether as a joint tenant or as a tenant by the entirety, than she has in the nonvested expectancy interest that she stands to inherit by will or intestacy. Accordingly, it has been recognized that much care in drafting is required to properly address what exactly the statute seeks to deny a slayer.[122]

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118. A tenancy by the entirety is, in most ways, the same as a joint tenancy with the further requirement that the tenants be married. TIFFANY, *supra* note 34, § 195. *But see* Peter Hay, *Recognition of Same-Sex Legal Relationships in the United States*, 54 AM. J. COMP. L. SUPP. 257, 268 (2006) (noting that in at least one recent case, the benefits of tenancy by the entirety have been granted to nonmarried domestic partners). As with joint tenancies, the outstanding characteristic of a tenancy by the entirety is the right of survivorship. TIFFANY, *supra* note 34, § 195. However, unlike a joint tenancy, survivorship rights cannot be defeated unilaterally by either tenant. *Id.* Tenancies by the entirety are recognized in Alabama, Alaska, Arkansas, Colorado, Delaware, the District of Columbia, Florida, Georgia, Hawaii, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, the Virgin Islands, and Wyoming. Alan M. Ahart, *The Liability of Property Exempted in Bankruptcy for Pre-Petition Domestic Support Obligations After BAPCPA: Debtors Beware*, 81 AM. BANKR. L.J. 233, 239-41 (2007).

119. Other property interests, such as dower, curtesy, and revocable transfers, have caused controversy to a lesser degree, but those are beyond the scope of this Note. *See generally* RESTATEMENT (FIRST) OF RESTITUTION: QUASI CONTRACTS & CONSTRUCTIVE TRUSTS § 188 (1937); 4 GEORGE E. PALMER, THE LAW OF RESTITUTION § 20.11 (1978).

120. TIFFANY, *supra* note 34, § 187.

121. Wade, *supra* note 10, at 728 ("The problem here is different . . . since the slayer already has a property interest, of which he cannot constitutionally be deprived by the statute.").

122. *Id.* at 721.

D. *Statutory Approaches Addressing Joint Property Interests of Slayers in Slayer Statutes*

Early statutes, due to their underinclusive nature,[123] rarely mentioned these vested joint interests at all.[124] Courts construing these silent statutes often held that they prevented the slayer from taking as devisee or legatee only, leaving intact the interests attendant to nonprobate transfers such as joint tenancy and tenancy by the entirety.[125] The courts reasoned that a murderous joint tenant or tenant by the entirety could not, and shall not, be divested by operation of a probate statute.[126] However, cognizant of both the equitable dilemma raised by allowing a killer to acquire the entire estate and the serious constitutional issues raised by divesting him of his vested interest, courts began to articulate methods that might avoid both of these problems by limiting a slayer to some amount of the jointly held property, but less than the entire estate.[127] Two dominant approaches have emerged from these articulations.[128] Under the first approach, an unlawful act causes a severance of the tenancy,[129] thus allowing the slayer to retain only a one-half share—not to acquire the remainder of the jointly owned interest as he normally would. Under the second, the unlawful act causes some portion of the jointly held property to be held in a constructive trust for the heirs of the deceased, often limiting the slayer's retention to a one-half interest for life.[130] The ultimate goal under

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123. *See supra* Part III.A.

124. Reppy, *supra* note 21, at 263-64 (stating that in 1888, North Carolina was the first state to address the issue statutorily).

125. *See* Ashwood v. Patterson, 49 So. 2d 848, 850 (Fla. 1951) (en banc) (noting the lack of any cognizable transfer of interest in the working of survivorship); Bradley v. Fox, 129 N.E.2d 699, 706 (Ill. 1955) (noting that a murderous husband did not actually take at the death of his wife); Vesey v. Vesey, 54 N.W.2d 385, 388 (Minn. 1952); *supra* Part III.C.

126. Woodson v. Foster (*In re* Estate of Foster), 320 P.2d 855, 860 (Kan. 1958) (joint tenants); *Vesey*, 54 N.W.2d at 385 (joint owner of a joint and several bank account).

127. *See, e.g.*, Colton v. Wade, 80 A.2d 923, 925 (Del. Ch. 1951). The court conceded that under the doctrine of tenancy by the entirety, the slayer's interest is vested and he strictly gains no new interest by the death of his spouse. *Id.* Nonetheless, the court subjected the property to a constructive trust for the benefit of the decedent's heirs in order to overcome the inequitable means utilized in an attempt to gain *sole* possession. *Id.*

128. Fellows, *supra* note 102, at 515. This dichotomy is based on "the assumption that the slayer and the victim were the only joint tenants." *Id.*

129. *See* UNIF. PROBATE CODE § 2-803 (amended 1997), 8 U.L.A. 58-59 (Supp. 2008).

130. *See generally* RESTATEMENT (FIRST) OF RESTITUTION: QUASI CONTRACTS & CONSTRUCTIVE TRUSTS § 188 (1937).

both of these approaches is to prevent the slayer from benefiting in any way from his act.[131]

1. The Severance Approach

A judicial or statutory severance of the joint interest is the most common solution to the slayer problem.[132] Various rationales support this result. For instance, in cases of tenancy by the entirety, courts have observed that a felonious killing is analogous to a divorce or marriage dissolution in that a murderous spouse willfully dissolves the marital relationship, thereby destroying the essential element of marriage. This act severs the tenancy and the slayer loses his right of survivorship.[133] In the case of joint tenancies, courts have found the justification for severance by parsing out the relevant interests held by a surviving joint tenant.[134] In so doing, courts have observed that, notwithstanding the fiction that the right of survivorship delivers nothing to the survivor,[135] an additional interest is in fact realized in the succession from joint to sole ownership.[136] To the extent that such a gain is cognizable, statutes and the equitable powers of the court can prevent a slayer from so profiting from his wrong.[137]

In addition to logically parsing the various interests held by a joint tenant, severance credits a slayer's preslaying right to sever and partition the property, taking half in fee, independent of survivorship.[138] The authors of the Uniform Probate Code,[139] commen-

131. Fellows, *supra* note 102, at 515.

132. Of the forty-five states that currently have some form of slayer statute on the books, thirty of them require a severance of the tenancy in cases involving a murder by the cotenant in a tenancy by the entirety or joint tenancy. Wade, *supra* note 10, at 715.

133. Ashwood v. Patterson, 49 So. 2d 848, 850 (Fla. 1951); Budwit v. Herr, 63 N.W.2d 841, 848 (Mich. 1954).

134. *In re* Estate of Kirk, 591 N.W.2d 630, 634-35 (Iowa 1999).

> The proportional interest is the joint tenant's interest which comes from the creation of the joint tenancy which necessarily occurs before the death of another joint tenant. The accretive interest, on the other hand, is the interest the survivor receives at the death of a joint tenant. Thus, where two joint tenants have an interest in property and one joint tenant dies, the surviving joint tenant has a one-half proportional interest and a one-half accretive interest.

Id. (citations omitted).

135. Grose v. Holland, 211 S.W.2d 464, 465-67 (Mo. 1948).

136. *Id.*

137. *See id.*

138. Fellows, *supra* note 102, at 515. In the case of a joint tenancy, severance may be accomplished unilaterally. *See* Riddle v. Harmon, 162 Cal. Rptr. 530, 534 (Cal. Ct. App. 1980). Tenants by the entirety do not have this unilateral right. TIFFANY, *supra* note 34, § 195. The salience of this difference, in terms of its determining the rights of

tators,[140] case law,[141] and the slayer statutes in a majority of states[142] support the severance approach.

2. The Constructive Trust Approach

An alternative measure used to prevent a slayer from taking the entire estate is the imposition of a constructive trust upon all or some portion of the joint property.[143] Although utilized in only a

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cotenants, has largely been overlooked by commentators, legislatures, and courts, who have treated both according to a single rule. Fellows, *supra* note 102, at 517. Proponents of severance have glossed over these differences by analogizing to the right to sever a tenancy by the entirety through divorce. *See, e.g.*, Preston v. Chabot, 412 A.2d 930, 933 (Vt. 1980). Proponents of imposition of a constructive trust have reasoned similarly. *See* Nat'l City Bank of Evansville v. Bledsoe, 144 N.E.2d 710, 714 (Ind. 1957); Estate of Foleno *ex rel.* Thomas v. Estate of Foleno, 772 N.E.2d 490, 496 (Ind. Ct. App. 2002); Sundin v. Klein, 269 S.E.2d 787, 792 (Va. 1980). Some commentators have balked at this outcome however. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.4 cmt. *l* (2003) ("[A] decree giving homicide the effect of severance is presumptively inappropriate.").

139. UNIF. PROBATE CODE § 2-803(c)(2) (amended 1997), 8 U.L.A. 58 (Supp. 2008) (stating that a slaying "severs the interests of the killer and decedent in property held by them at the time of the killing as joint tenants with right of survivorship"); *see also* UNIF. PROBATE CODE § 1-201(26) (amended 1990), 8 U.L.A. 13 (Supp. 2008) (defining "Joint tenants with right of survivorship" to include tenants by the entirety).

140. *See, e.g.*, Wade, *supra* note 10, at 732.

141. *See, e.g.*, Johansen v. Pelton, 87 Cal. Rptr. 784, 791-92 (Cal. Ct. App. 1970); Bradley v. Fox, 129 N.E.2d 699, 705-06 (Ill. 1955); Maine Sav. Bank v. Bridges, 431 A.2d 633, 636 (Me. 1981); Williford v. Cantwell (*In re* Estate of Cox), 380 P.2d 584, 587 (Mont. 1963); Duncan v. Vassaur, 550 P.2d 929, 931 (Okla. 1976); Gelden v. Safran (*In re* Estate of Safran), 306 N.W.2d 27, 38 (Wis. 1981).

142. The Uniform Probate Code approach, and thus severance, has been hugely influential on legislatures and has been adopted in nineteen states. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.4 reporter's note 1 (2003) (naming nineteen states that have based their slayer statute on the Uniform Probate Code); *see also* ALA. CODE. § 43-8-253 (LexisNexis 1991); ALASKA STAT. § 13.12.803 (2006); ARIZ. REV. STAT. ANN. § 14-2803 (2005); CAL. PROB. CODE §§ 250-54 (West 2002 & Supp. 2008); COLO. REV. STAT. ANN. § 15-11-803 (West 2005); FLA. STAT. ANN. § 732.802 (West 2005); HAW. REV. STAT. ANN. § 560:2-803 (LexisNexis 2005); ME. REV. STAT. ANN. tit. 18-A, § 2-803 (1998); MICH. COMP. LAWS ANN. § 700.2803(2)(b) (West 2002); MINN. STAT. ANN. § 524.2-803 (West 2002); MONT. CODE ANN. § 72-2-813(3)(b) (2007); NEB. REV. STAT. § 30-2354 (1995); N.J. STAT. ANN. §§ 3B:7-1.1(West 2007); N.M. STAT. ANN. § 45-2-803 (West 2003); S.C. CODE ANN. § 62-2-803 (1987 & Supp. 2007); S.D. CODIFIED LAWS § 29A-2-803 (2004); UTAH CODE ANN. § 75-2-803(3)(b) (Supp. 2008); WIS. STAT. ANN. § 854.14 (West 2002 & Supp. 2007).

143. *See generally* RESTATEMENT (FIRST) OF RESTITUTION: QUASI CONTRACTS & CONSTRUCTIVE TRUSTS § 188 (1937) ("Where two persons have an interest in property and the interest of one of them is enlarged by his murder of the other, to the extent to which it is enlarged he holds it upon a constructive trust for the estate of the other.").

minority of state slayer statutes,[144] this approach is recommended by the *Restatement of Restitution*,[145] and finds support in commentary[146] as well as case law.[147] As is the case with severance, proponents of the constructive trust theory base their analysis "upon the principle that although the murderer will not be deprived of property to which he would otherwise be entitled, he will not be entitled to profit by the murder."[148] Like the severance rationale, the constructive trust doctrine recognizes the ability of the courts or legislatures to parse out the interests held by the slayer and prevent her from taking any property, right, or interest not clearly vested in the slayer before her felonious act.[149] The constructive trust doctrine also precludes the possibility that the slayer will ultimately survive the deceased.[150] Imposition of a constructive trust resolves the doubt as to order of deaths against the slayer by assuming that she would have naturally predeceased her victim.[151] Based on such an assumption, it has been observed that all a killer was ever really guaranteed is the use value of the net income of one half of the property for her life; all else is merely an expectancy interest.[152] In effect, the imposition of a constructive trust treats the joint tenancy as if it remains intact—as if the victim were not dead—and allows

144. *See* N.C. GEN. STAT. § 31A-6 (2007); OR. REV. STAT. §§ 112.475, .485 (2007).

145. RESTATEMENT (FIRST) OF RESTITUTION: QUASI CONTRACTS & CONSTRUCTIVE TRUSTS § 188.

146. Most notable of these commentators is John Wade. *See* Fellows, *supra* note 102, at 515-16, n.77. Those states that utilize a constructive trust in the case of joint interests essentially adopt Professor Wade's joint tenancy model provision verbatim. *Id.*; *see also* Wade, *supra* note 10, at 725-26.

147. *See* Colton v. Wade, 80 A.2d 923, 925 (Del. Ch. 1951) ("My conclusion that a trust should be impressed gives powerful recognition to the deeply imbedded equitable principle that a person shall not be permitted to profit by his own wrong.").

148. RESTATEMENT (FIRST) OF RESTITUTION: QUASI CONTRACTS & CONSTRUCTIVE TRUSTS § 188 cmt. a; *see also* Estate of Foleno *ex rel.* Thomas v. Estate of Foleno, 772 N.E.2d 490, 496 (Ind. Ct. App. 2002).

149. *See Colton*, 80 A.2d at 925; Nat'l City Bank of Evansville v. Bledsoe, 144 N.E.2d 710, 714 (Ind. 1957).

150. 5 AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 493.2 (4th ed. 1989).

151. *Id.* § 493.2(3) ("[I]t would seem legitimate in any event to resolve doubts as to who would have been the survivor but for the murder in favor of the victim and against the murderer."); *see also Colton*, 80 A.2d at 926.

152. *See Colton*, 80 A.2d at 925; *Bledsoe*, 144 N.E.2d at 715. It is important to note that application of a trust to the entire estate is the most restrictive version of the rationale. Some proponents of the constructive trust have limited its application to the undivided one-half interest in the tenancy, thus, in effect, utilizing severance in addition to the trust to resolve the issue. *See Estate of Foleno*, 772 N.E.2d at 496; Barnett v. Couey, 27 S.W.2d 757, 760 (Mo. Ct. App. 1930).

the victim's estate to succeed to either half or the entire property upon the slayer's death.[153]

Both of these approaches allow a statute to be as comprehensive as equitable principles demand while simultaneously avoiding unconstitutional overinclusiveness cautioned by the "owned interest" rationale. While it is arguable that severance or the application of a constructive trust may stretch the owned interest rationale to its limit,[154] these approaches have nonetheless managed to maintain a balance between the competing demands of law and equity. The approach taken by Massachusetts differs in ways that threaten to topple this carefully struck balance.

IV. THE MASSACHUSETTS STATUTE

To properly assess the overall comparability and placement of the Massachusetts statute within the larger understanding of the slayer problem that developed in the century prior to its passage, it is necessary to pause for a moment and analyze, in depth, the statute, its effect, and the legislative considerations from which it sprang. Such an analysis reveals a difference in approach and apparent intent that directly impact the constitutionality of the statute as written.[155]

A. *The Statute Requires a Forfeiture to be Exacted Against Surviving Joint Tenants and Tenants by the Entirety*

Massachusetts General Law chapter 265, section 46 is among the most recently passed state slayer statutes currently in effect.[156]

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153. Fellows, *supra* note 102, at 517. Professor Fellows criticizes this approach as follows:

> A straightforward application of the fiction that the victim survived the slayer is appealing, but a state should not adopt the [constructive trust] view because it compels the state to adopt the further fiction that the slayer died without exercising the right to sever. [This] view fails to recognize that the slayer's right to sever makes the victim's right to take as survivor no longer relevant when applying the slayer rule.

Id.

154. *Id.* at 542 (noting that in some cases the courts have been forced to strain "their analysis to find an expectancy interest and uphold the slayer rule").

155. *See infra* Parts V.A-B.

156. Jeffrey G. Sherman, *Mercy Killing and the Right to Inherit*, 61 U. CIN. L. REV. 803, 805 (1993) (noting that at the time of writing, 1993, Massachusetts and New Hampshire were the only two states not applying either a common law or statutory slayer rule). Since that time, Massachusetts passed Massachusetts General Law chapter 265, section 46 in 2003, and New Hampshire adopted a common law rule requiring the imposition of a constructive trust in the cases involving the slayer rule and joint prop-

In it, the Massachusetts legislature has taken an approach in regard to joint tenancies and tenancies by the entirety that differs elementally from approaches taken by other states, courts, and commentators.[157] Rather than severing the interests in the property or imposing an equitable trust, the Massachusetts statute explicitly requires that property held jointly or by the entirety be distributed as if the slayer had predeceased the decedent.[158] The consequence of this approach is that, by operation of law, all property interests, including vested interests, held by a surviving joint tenant are forfeited by operation of the statute.[159]

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erty interests. *See* An Act Relative to the Descent and Distribution of Property, 2002 Mass. Acts 1195 (codified at MASS. GEN. LAWS ch. 265, § 46 (2006)); Hopwood v. Pickett, 761 A.2d 436, 438 (N.H. 2000); Kelley v. State, 196 A.2d 68, 69-70 (N.H. 1963).

157. Forfeiture of a vested interest by operation of the slayer rule or a slayer statute is not without precedent. *See, e.g.*, Lore v. Habermeyer (*In re* King's Estate), 52 N.W.2d 885, 889 (Wis. 1952) (granting the whole of the joint property to the victim's estate), *modification recognized by* Hackl v. Hackl (*In re* Estate of Hackl), 604 N.W.2d 579, 582-83 (Wis. Ct. App. 1999). Modern thinking on the issue nearly unanimously rejects the result reached in *Lore*. *See* McGovern, Jr., *supra* note 9, at 86 (stating in 1969 that all jurisdictions allow the slayer to keep his interest because his "interest is not acquired from his crime"). *But see* Lakatos v. Estate of Billotti, 509 S.E.2d 594, 597-98 (W. Va. 1998) (construing the words "or otherwise" in the West Virginia slayer statute to include the right of survivorship and holding that the "statutory language clearly provides that upon the death of the victim, the total estate in a joint tenancy passes in its entirety" as "if the slayer had predeceased the victim").

158. MASS. GEN. LAWS ch. 265, § 46. The statute reads in part:

> The court shall prohibit any person charged with the unlawful killing of the decedent from taking from the decedent's estate through its distribution and disposition, including property held between the person charged and the decedent in joint tenancy or by tenancy in the entirety. *The court shall consider any person convicted of the unlawful killing of the decedent as predeceasing the decedent for the purpose of distribution and disposition of the decedent's estate including property held between the person charged and the decedent in joint tenancy or by tenancy in the entirety.* The bar to succession shall apply only to murder in the first degree, murder in the second degree or manslaughter; it shall not include vehicular homicide or negligent manslaughter in the death of the decedent. No court shall distribute the accused's share of the decedent's assets until a verdict or finding on the charge has been rendered in open court.

Id. (emphasis added).

The use of the fiction that the slayer has predeceased the decedent for the purposes of descent and distribution is common among slayer statutes. *See* Wade, *supra* note 10, at 724-25. Professor Wade, in his highly influential model slayer statute, recommended the application of this fiction as early as 1936. *See id.* It is the application of this fiction to interests with the right of survivorship that is without precedent. *See id.* at 728 (noting that application of this fiction to tenancies by the entirety would not be acceptable "since the slayer already has a property interest, of which he cannot constitutionally be deprived by [a] . . . statute").

159. This is because of the operation of joint tenancies generally. Massachusetts, like all states that allow joint tenancies and tenancies by the entirety, recognizes that

This departure from previously accepted means of dealing with the slayer problem is remarkable in a number of ways.[160] First, it deemphasizes the primacy of the maxim that a person should not be allowed to profit from his own wrong by exceeding the scope of this goal and producing the type of punitive forfeiture that has been warned against since the enactment of the earliest model slayer statutes.[161] Notwithstanding variances in approach, there had been a previous consensus that equity is not best served by depriving killers of their own property but by preventing them from wrongfully acquiring the property of their victims.[162] In abandoning this dis-

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when one joint tenant dies, the surviving tenant takes the entire estate automatically because the two tenants are considered one. *See* Bernatavicius v. Bernatavicius, 156 N.E. 685, 686 (Mass. 1927); *see also* TIFFANY, *supra* note 34, § 188. Therefore, pursuant to two legal fictions, first that joint tenants and tenants by the entirety are one entity and second that a convicted cotenant has predeceased the deceased, the now "deceased" murderer loses all vested interest in the property.

160. On its face, the statute operates on two discrete levels. First, it requires that the court prohibit a person *charged* with killing the victim "from taking from the decedent's estate through its distribution and disposition, including property held between the person charged and the decedent" jointly or by the entirety. MASS. GEN. LAWS ch. 265, § 46. At this point, the statute does not require that the court distribute the property in accordance with the predeceased fiction or otherwise. *See id.* Instead, the statute merely mandates that the accused be prevented from taking. *Id.*

The use of the phrase "taking from the decedent's estate" has some latent ambiguities in and of itself. It has been argued, and argued successfully, that one tenant by the entirety does not "take" anything upon the death of the other. *See* Beddingfield v. Estill, 100 S.W. 108, 110 (Tenn. 1907) (holding that a husband "could not and did not inherit, acquire, or otherwise take any interest or estate in the lands from or through his wife" upon her death because title to the entire estate "was acquired and vested in him by the conveyances made to him and his wife previous to her death"); *see also* Woodson v. Foster (*In re* Estate of Foster), 320 P.2d 855, 858 (Kan. 1958).

In the case of the Massachusetts statute, however, this potential ambiguity seems to be resolved with the immediate inclusion of these estates. *See* MASS. GEN. LAWS ch. 265, § 46. In effect, this provision merely freezes those assets in question until resolution of the charges against the defendant. *See id.* This interpretation seems to be supported by the inclusion of the language "[n]o court shall distribute the accused's share of the decedent's assets until a verdict or finding on the charge has been rendered in open court," which appears later in the statute. *Id.*

Second, the statute requires that upon conviction of the accused, the court distribute those relevant assets as if the killer had "predeceas[ed] the decedent for the purpose of distribution and disposition." *Id.* Once again, the statute clearly applies this fiction to joint tenancies and tenancies by the entirety. *Id.* If the person charged is found not guilty, the statute states that "the accused may take." *Id.*

161. While the equitable postulate that one must be prevented from profiting from one's own wrong was referenced during legislative debates, the statute goes far beyond this goal. Wade, *supra* note 10, at 728.

162. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.4 cmt. 1 (2003) (adopting the view of the RESTATEMENT (FIRST) OF RESTITUTION: QUASI CONTRACTS & CONSTRUCTIVE TRUSTS § 188 (1937) that a slayer who is a tenant by the entirety or a joint tenant with a right of survivorship "retains only the right to

tinction, the Massachusetts statute loses the protection of the owned interest rationale resulting in a unique vulnerability to constitutional challenges based on forfeiture.[163]

Moreover, in addition to deemphasizing an equitable or remedial intent, the Massachusetts statute produces an undeniably punitive effect.[164] Many other legislatures have been emphatic, often on the face of their slayer statutes, that those statutes function as equitable rather than punitive measures.[165] While a purely remedial legislative action does not trigger a full panoply of constitutional protections, a statute that is punitive both in effect and intent implicates state and federal constitutional protections—most notably those guaranteeing due process of law and prohibiting ex post facto laws and double jeopardy.[166] On its face, the Massachusetts statute

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half of the income from the property for life" while simultaneously maintaining that a slayer's own property is not forfeited). *Compare id.*, *with* UNIF. PROBATE CODE § 2-803 (amended 1997), 8 U.L.A. 58-59 (Supp. 2008) (adopting the alternate view that a slayer who is a tenant by the entirety or a joint tenant with a right of survivorship retains an undivided one-half interest in fee, yet also interpreted as prohibiting forfeiture of a vested interest). An example can be seen in *Howard v. Mejia*, where the court determined that the applicable statute did not intend to divest a person of his vested property rights. Howard v. Mejia (*In re* Estate of Alarcon), 718 P.2d 993 (Ariz. App. 1984).

163. The owned interest rationale limits cognizable forfeitures to property interests that are vested rather than mere expectancy interests. *See supra* Part III.B; *see also* Nat'l City Bank of Evansville v. Bledsoe, 144 N.E.2d 710, 716 (Ind. 1957).

164. The fact that the statute so explicitly requires the application of the "predeceased the decedent fiction" to joint interests leaves little room for a nonpunitive, constitutionally sound construction of the statute as drafted. *See* 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 47:23 (6th ed. 2000) ("A statute which provides that a thing shall be done in a certain way carries with it an implied prohibition against doing that thing in any other way.").

165. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.4 cmt. a (2003) ("The slayer rule is not punitive, that being the function of the criminal law."); *see, e.g.*, DEL. CODE ANN. tit. 12, § 2322(k) (1995) ("This section shall not be considered penal in nature, but shall be constructed broadly in order to effect the policy of this state that a person shall not be permitted to profit by that person's own wrong."); IDAHO CODE ANN. § 15-2-803(n) (2001) ("This section shall not be considered penal in nature, but shall be construed broadly in order to effect the policy of this state that no person shall be allowed to profit by his own wrong, wherever committed."). Such a concern has also been echoed by courts construing statutes. *See, e.g.*, Armstrong v. Bray, 826 P.2d 706, 709 (Wash. Ct. App. 1992) (interpreting the statute as preventing killers "from profiting from their wrongful act[s]"). The court emphasized that "[s]tatutes were not enacted to exact a penalty." *Id.*

166. *See* Opinion of the Justices to The Senate, 668 N.E.2d 738, 748-49 (Mass. 1996) ("In deciding whether the three constitutional protections in issue here—ex post facto, due process, and double jeopardy—are applicable, our cases and those of the Supreme Court of the United States have designated the distinction as that between laws that are 'criminal and punitive, or civil and remedial.'" (quoting United States v.

includes no statement of remedial or equitable intent.[167] Rather, as applied to joint property interests, the statute clearly requires a punitive forfeiture, evincing the intent of the legislature to punish.[168] This interpretation is further supported by an examination of the legislative record and the circumstances of its passage.

B. *The Legislative History Suggests that the Massachusetts Slayer Statute was Intended to be Punitive*

The legislative history and the circumstances surrounding the passage of the Massachusetts slayer statute suggest that it was intended to be punitive. First, the legislature elected to include the slayer statute in the criminal rather than the probate portion of the Massachusetts code. Further, as discussed below, the evolution of the proposed legislation makes clear that the legislature could foresee and understand that the statute would result in a forfeiture of vested interests of surviving joint tenants and tenants in the entirety.[169] Moreover, the legislative history strongly suggests that the statute is purposefully penal in nature.[170]

The statute that was passed into law in 2002 was the third draft of a bill brought before the House addressing the slayer issue.[171] The first draft of this legislation, House Bill 2565, was proposed on January 3, 2001.[172] House Bill 2565 required anyone convicted of certain types of unlawful killing to be deemed to have predeceased the decedent for the purposes of distribution.[173] It did not mention joint tenancies or tenancies by the entirety at all.[174]

The second draft of the legislation, introduced on July 26, 2001, again required anyone convicted of certain types of unlawful killing to be deemed to have predeceased the decedent for the purposes of

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One Assortment of 89 Firearms, 465 U.S. 354, 362 (1984))). *See generally* 3 SINGER, *supra* note 164, § 60.

167. *See* MASS. GEN. LAWS ch. 265, § 46 (2006).

168. *See generally* 3 SINGER, *supra* note 164, § 59:1-:2 (Statutes or regulations that impose forfeitures are penal in nature and must be strictly construed.).

169. 2A *id.* § 48:04 ("The events occurring immediately prior to the time when an act becomes law comprise an instructive source, indicative of what meaning the legislature intended.").

170. 3 *id.* § 59:1 (The "penal character [of a statute] may apply to 'fines and imprisonments' only, or it may include '*penalties and forfeitures*' . . . ." (emphasis added)).

171. An Act Relative to the Descent and Distribution of Property, ch. 420, § 11, 2002 Mass. Acts 1195 (codified at MASS. GEN. LAWS ch. 265, § 46 (2006)).

172. H.R. 2565, 182d Gen. Court (Mass. 2001) (as petitioned by Rep. Sullivan, Jan. 3, 2001).

173. *Id.*

174. *Id.*

distribution.[175] Unlike its predecessor, however, House Bill 4412 provided for joint tenants and tenants by the entirety.[176] It stated that any person "for whom the rights of joint tenancy or tenancy by the entirety apply," who is charged with certain types of unlawful killing "shall be prohibited from receiving *the assets of the decedent*."[177] Importantly, this draft of the proposed legislation did not require that a joint tenant or a tenant by the entirety be deemed to have predeceased the decedent.[178] From both the separate inclusion and differential treatment of joint interests, it can be inferred that, at a minimum, the legislature recognized some differences between these and other property interests.[179] The differences at issue, long recognized at common law, are those attendant to the statutory right of survivorship.[180] First, a surviving joint tenant takes the entire property in fee by operation of the right of survivorship rather than through probate. [181] Second, the property interests germane to joint tenants include both a present vested one-half interest and a future expectancy interest.[182] A legislative knowledge of this second difference is reflected in other areas of Massachusetts law.[183]

The third draft of the legislation, House Bill 5136, proposed on June 12, 2002, contained the language that eventually became the enacted Massachusetts slayer statute.[184] Like House Bill 4412,

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175. H.R. 4412, 182d Gen. Court (Mass. 2001) (as reported by J. Comm. on the Judiciary, July 26, 2001).

176. *Id.*

177. *Id.* (emphasis added). Presumably, this is referring to the statutory right of survivorship.

178. *Id.*

179. *See* Meunier's Case, 66 N.E.2d 198, 200 (Mass. 1946) (in construing a statute, "[n]one of its words is to be rejected as surplusage"); 2A SINGER, *supra* note 164, § 47:37 ("The existence of surplus words should never be presumed.").

180. *See supra* section III.C.

181. TIFFANY, *supra* note 34, § 188.

182. *See* 2B SINGER, *supra* note 164, § 50:1 ("The legislature is presumed to know the common law before a statute was enacted.").

183. The Massachusetts simultaneous death statute (MSDS) states that, in the event of simultaneous death, joint tenancies and tenancies by the entirety are effectively converted into tenancies in common. MASS. GEN. LAWS ch. 190A, § 3 (2006). The MSDS directs that in such cases joint property "shall be distributed one half as if one had survived and one half as if the other survived." *Id.* The legislature's treatment of joint interests in this way indicates that the legislature recognized that a joint tenant is the owner of an interest equal to that of each other joint tenant. *See* 2B SINGER, *supra* note 164, § 51:2. Indeed, this is among the rationales used in a majority of jurisdictions that employ the severance approach in addressing slayers and joint property interests. *See supra* note 134 and accompanying text.

184. H.R. 5136, 182d Gen. Court (Mass. 2002).

House Bill 5136 separately identifies joint tenancies and tenancies by the entirety, but adds the requirement that upon conviction these joint assets also be distributed as if "the person convicted of the unlawful killing had predeceased the decedent."[185] In light of the legislative history and the legislature's knowledge of the nature and operation of joint property with the right of survivorship,[186] it is reasonable to conclude that this provision knowingly and intentionally imposes a punitive forfeiture upon those surviving joint tenants to whom it applies. Accordingly, the only reasonable construction of this provision of the statute is that it is punitive by design and penal in character.

V. Analysis of the Problems, Constitutional and Otherwise, Raised by the Massachusetts Approach

The differences in the Massachusetts approach are more than a mere expression of legislative prerogative. The choice to ignore the limits of the owned interest rationale and to pass a statute that results in a punitive forfeiture makes the statute, as applied to joint property holders, uniquely vulnerable to constitutional challenge.[187] Such an attack would most likely come on one of two fronts. The first argument is that the statute amounts to an unconstitutional taking in violation of the United States Constitution and potentially the Massachusetts Declaration of Rights as well as Massachusetts common law. This is the most common argument made in other jurisdictions whose slayer statutes are silent on the treatment of joint property interests.[188] Second, it may be argued that due to the punitive nature and penal character of the statute, application of the statute amounts to a second punishment for a single crime in violation of the Double Jeopardy Clause of the Fifth Amendment

185. *Id.*

186. Particularly as reflected in and evinced by House Bill No. 4412 and the MSDS. *See* Mass. Gen. Laws ch. 190A, § 3; H.R. 4412, 182d Gen. Court (Mass. 2001); *supra* note 183.

187. Wade, *supra* note 10, at 721 (concluding that due process, forfeiture, corruption of blood, double jeopardy, and other concerns are made moot when "a statute prevents merely the acquisition of property by an unlawful killing," namely, when a statute is not punitive). *See* 3 Singer, *supra* note 164, § 60.

188. Fellows, *supra* note 102, at 538-39 ("Slayers [have] frequently relied on [anti-forfeiture provisions] to argue that the slayer rule is unconstitutional."). As applied to joint interests, these arguments are only salient in the minority of states whose slayer statutes do not explicitly address treatment of joint property using either the severance or constructive trust approaches.

of the United States Constitution[189] as well as the Massachusetts Declaration of Rights.[190]

In the absence of any reported case law analyzing the operation of the Massachusetts statute, analysis of these claims must be informed, in part, by case law and precedent from other jurisdictions. However, both the novelty of the Massachusetts approach and the inherently idiosyncratic nature and variance among state statutes and state constitutions upon which challenges to slayer statutes are most commonly based[191] necessitate a largely original analysis of the potential constitutional arguments.

A. *Forfeiture Analysis*

1. An Analysis of Forfeiture Claims under the Massachusetts Constitution

The most common attack levied against slayer statutes has been that they violate constitutional prohibitions against criminal forfeiture.[192] At a most basic level, forfeiture occurs when a person is deprived of property because of the commission of some act.[193] Requiring a person to forfeit property as a result of having been convicted of a crime is generally disfavored under the law of the

189. U.S. CONST. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . .").

190. *See* Benton v. Maryland, 395 U.S. 784, 794 (1969) (holding that double jeopardy clause protections extend to state prosecutions under the Fourteenth Amendment's Due Process Clause); *supra* note 13 for discussion of the Massachusetts common law prohibition on double jeopardy.

191. For example, the Massachusetts Constitution is idiosyncratic in that it lacks an anti-forfeiture provision. Massachusetts is in a small minority of states lacking such a provision. Fellows, *supra* note 102, at 538 n.147; *see, e.g.*, ALA. CONST. art. I, § 19; ALASKA CONST. art. I, § 15; ARIZ. CONST. art. 2, § 16; CAL. CONST. art. I, § 9; COLO. CONST. art. II, § 9; CONN. CONST. art. IX, § 4; DEL. CONST. art. I, § 15; FLA. CONST. art. I, § 17; GA. CONST. art. I, § 1 ¶ XX; ILL. CONST. art. I, § 11; IND. CONST. art. I, § 30; KAN. CONST. Bill of Rights, § 12; KY. CONST. Bill of Rights, § 20; ME. CONST. Art I, § 11; MD. CONST. Dec. of Rights art. 27; MICH. CONST. art. I, § 10; MINN. CONST. art. I, § 11; MO. CONST. art. I, § 30; MONT. CONST. art. II, § 30; NEB. CONST. art. I, § 15; N.C. CONST. art. I, § 29; OHIO CONST. Art I, § 12; OKLA. CONST. art. II, § 15; OR. CONST. art. I, § 25; PA. CONST. art. I, § 19; S.C. CONST. art. I, § 4; TENN. CONST. art. I, § 12; TEX. CONST. art. I, § 21; WASH. CONST. art. I, § 15; W. VA. CONST. art. III, § 18; WIS. CONST. Art I, § 12.

192. Fellows, *supra* note 102, at 539-40; *see also, e.g.*, Welsh v. James, 95 N.E.2d 872, 875 (Ill. 1950), *overruled in part by* Bradley v. Fox, 129 N.E.2d 699 (Ill. 1955).

193. *See* BLACK'S LAW DICTIONARY 677 (8th ed. 2004) (defining forfeiture as "[t]he loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty").

United States.[194] As discussed above, criminal forfeiture and other conditions of attainder have been soundly rejected by both state and federal legislatures since the country's founding.[195] The Constitution of 1787 itself contains multiple prohibitions against attainder.[196] Even prior to the ratification of that document, the constitutions of at least four states, including Massachusetts, contained similar prohibitions.[197] Through subsequently passed state constitutions and statutes in the period following ratification in 1787, "American legislatures effectively laid criminal forfeiture to rest for the next two centuries."[198]

While the owned interest rationale has been utilized to shield pure expectancy interests from claims that they amount to prohibited criminal forfeitures,[199] such claims continue to find traction

194. *See* U.S. CONST. art. III, § 3, cl. 2. (prohibiting the federal judiciary from imposing forfeiture or corruption of blood as a punishment for treason except during the life of the person who committed the treason).

195. It is important to note that constitutional prohibitions against attainder and forfeiture do not act as an absolute bar to requiring a convicted person to forfeit property as punishment for committing a crime. In the 1970s, statutes like the Racketeer Influenced and Corrupt Organizations Act (RICO) resurrected property forfeiture as a method of penalizing those convicted of criminal acts. Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, 84 Stat. 941 (1970) (codified as amended at 18 U.S.C. §§ 1961-68 (2000)). However, these modern forfeiture statutes generally steer clear of constitutional prohibitions by requiring that the property forfeited bear some relationship to the crime committed. *See* Vines, *supra* note 108, at 805. Such *in rem* forfeitures are considered civil rather than criminal in nature under the theory that the underlying action is against the piece of property that was used in the commission of a crime, or acquired as the result of criminal activity, rather than against the person who owns the property. *See* Waterloo Distilling Corp. v. United States, 282 U.S. 577, 581 (1931) ("[I]t is the property which is . . . held guilty and condemned as though it were conscious instead of inanimate and insentient."). However, these fictions are unavailing for slayer statutes as it is difficult to conceive of a situation where property owned jointly by a slayer and his victim might have been an instrumentality of the murder as to be itself guilty of the crime. *See* Myers, *supra* note 14, at 1025 ("[A] killer's previously held interest in the joint tenancy property, is not the fruits of criminal activity and was not a part of the criminal activity.").

196. *See, e.g.*, U.S. CONST. art. III, § 3, cl. 2; Jacob Reynolds, *The Rule of Law and the Origins of the Bill of Attainder Clause*, 18 ST. THOMAS L. REV. 177, 182 (2005) (remarking on the presence of "multiple attainder clauses").

197. LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 70 (1999).

198. Matthew R. Ford, Comment, *Criminal Forfeiture and the Sixth Amendment's Right to Jury Trial Post-*Booker, 101 NW. U. L. REV. 1371, 1403 (2007).

199. The owned interest rationale limits cognizable forfeitures to property interests that are vested rather than mere expectancy interests. *See* Neiman v. Hurff, 93 A.2d 345, 348 (N.J. 1952); *supra* Part III.B. This limited application of the forfeiture argument is attributable to the general acceptance of this rationale that has curtailed what amounts to a forfeiture. *See* Nat'l City Bank of Evansville v. Bledsoe, 144 N.E.2d 710, 716 (Ind. 1957) (holding that imposition of a constructive trust would circumvent constitutional problems that would be created by divesting the surviving-murderer

when parties seek to extend the scope of slayer statutes to vested property interests such as those attendant to jointly held property.[200]

In states where the disfavor of criminal forfeiture is constitutionally expressed, courts have read constitutional prohibitions as precluding the statutory divestment of a surviving joint tenant's vested property interest.[201] For example, in the Kansas case *In re Estate of Shields*,[202] Victoria Shields was convicted of killing her husband.[203] Prior to his death, Victoria and her husband had owned property as joint tenants with a right of survivorship.[204] In an action for determination of the distribution of the property, the couple's two children claimed that, pursuant to the Kansas slayer statute, their mother had lost all interest in the joint property.[205] Victoria claimed that she retained one-half ownership in the joint property and argued that denial of her vested interest would be an

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spouse of all legal title to joint property). Prior to the acceptance of this rationale, however, constitutional arguments based on forfeiture concerns were made more broadly. *See, e.g.*, Wall v. Pfanschmidt, 106 N.E. 785, 790 (Ill. 1914); McAllister v. Fair, 84 P. 112, 113(Kan. 1906); 5 TIFFANY, *supra* note 42, § 1378.

200. *See* Gallimore v. Washington, 666 A.2d 1200, 1213 (D.C. 1995); Shields v. Shields (*In re* Estate of Shields), 574 P.2d 229, 233 (Kan. Ct. App. 1977), *aff'd*, 584 P.2d 139 (Kan. 1978); Pannone v. McLaughlin, 377 A.2d 597, 600 (Md. Ct. Spec. App. 1977). These cases arise only in the minority of states whose statutes do not specifically provide for the post-slaying disposition of joint property in their slayer statutes. *See, e.g.*, D.C. CODE § 19-320 (2001); GA. CODE ANN. § 53-1-5 (1997); KAN. STAT. ANN. § 59-513 (2005). The majority of state slayer statutes do so provide. *See* ALA. CODE § 43-8-253 (LexisNexis 1991) (severance); ALASKA STAT. § 13.12.803 (2006) (severance); ARIZ. REV. STAT. ANN. § 14-2803 (2005) (severance); CAL. PROB. CODE §§ 250-54 (West 2002 & Supp. 2008) (severance); COLO. REV. STAT. ANN. § 15-11-803 (West 2005) (severance); FLA. STAT. ANN. § 732.802 (West 2005) (severance); HAW. REV. STAT. ANN. § 560:2-803 (LexisNexis 2005) (severance); ME. REV. STAT. ANN. tit. 18-A, § 2-803 (1998) (severance); MICH. COMP. LAWS ANN. § 700.2803(2)(b) (West 2002) (severance); MONT. CODE ANN. § 72-2-813(3)(b) (2007) (severance); NEB. REV. STAT. § 30-2354 (1995) (severance); N.J. STAT. ANN. § 3B:7-1.1 (West 2007) (severance); N.M. STAT. ANN. § 45-2-803 (West 2003) (severance); N.C. GEN. STAT. § 31A-6(a), (b) (2007) (constructive trust); OR. REV. STAT. § 112.455-.555 (2007) (severance); S.C. CODE ANN. § 62-2-803 (1987 & Supp. 2007) (severance); S.D. CODIFIED LAWS § 29A-2-803 (2004) (severance); TENN. CODE ANN. § 31-1-106 (2007) (severance); UTAH CODE ANN. § 75-2-803(3)(b) (Supp. 2008) (severance); WIS. STAT. ANN. § 854.14 (West 2002 & Supp. 2007) (severance).

In states with ambiguous statutes, courts have sometimes been urged, mostly by heirs standing to inherit, to construe general bars against inheritance as divesting all property held jointly. *See, e.g.*, *Shields*, 574 P.2d at 233; *Pannone*, 377 A.2d at 602.

201. *Pannone*, 377 A.2d at 602.

202. *Shields*, 574 P.2d at 229.

203. *Id.* at 230.

204. *Id.*

205. *Id.*; *see also* KAN. STAT. ANN. § 59-513 (2005).

unconstitutional contravention of Section 12 of the Kansas Bill of Rights, which provided that "[n]o conviction within the state shall work a forfeiture of estate."[206] Based on the conclusion that "[t]he loss by the survivor of his or her vested interest . . . *would* . . . constitute a[n unconstitutional] forfeiture, the court sidestepped that possibility by refusing to give the slayer statute such an effect."[207] In *Shields*, the court held that constitutional prohibitions against forfeiture prevented exactly what the Massachusetts statute affirmatively requires—divestment of vested property rights for the conviction of a crime.[208]

In light of cases like *Shields*, it seems that the Massachusetts statute, as drafted, would be *a priori* impermissible.[209] However, Massachusetts, unlike Kansas, has not expressed the disfavor of criminal forfeiture constitutionally.[210] This omission largely undermines the most common type of claim made against slayer statutes—that they violate state constitutional provisions. However, the lack of such a provision in the Massachusetts Declaration of Rights does not necessarily insulate the slayer statute from attack.[211] First, there is much evidence that state common law has long prohibited criminal forfeitures and that this law has not been

206. *Shields*, 574 P.2d at 230-31 (quoting KAN. CONST. Bill of Rights § 12).

207. *Id.* at 233 (emphasis added).

208. *See id.* (noting that "[t]he loss by the survivor of his or her vested interest" would be an unconstitutional forfeiture).

209. In its holding, the *Shields* court noted that if the legislature had "imposed [a forfeiture] as a penalty for the felonious killing," such an act would violate the constitution. *Id.* Unlike the Kansas statute at issue in *Shields*, the Massachusetts statute is not silent or vague as to the treatment of joint interests. *Compare* KAN. STAT. ANN. § 59-513 (2005), *with* MASS. GEN. LAWS ch. 265, § 46 (2006) (explicitly including joint tenants and tenants by the entirety within the "predeceased the decedent" framework). This precludes a construction of the statute, as utilized in the *Shields* case, that would mitigate such an effect and salvage its constitutionality. *See Shields*, 574 P.2d at 234 (noting that if possible, the court is required to uphold legislation by finding "any reasonable way to construe the statute as constitutionally valid").

210. Unlike the state constitutions of a majority of states, the Massachusetts Declaration of Rights does not explicitly prohibit criminal forfeiture. *See supra* note 191. The most comparable language in the Massachusetts Constitution appears in Article 12 of the Declaration of Rights and states that "no subject shall be . . . deprived of his property . . . or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land." MASS. CONST. pt. 1, art. XII.

211. *See* Gallimore v. Washington, 666 A.2d 1200, 1213 (D.C. 1995) (Schwelb, J., dissenting on other grounds) ("The lack of any such constitutional or statutory provision does not mean . . . that a forfeiture is a presumptively acceptable remedy . . . .").

wholly abrogated by the statute.[212] Second, the Federal Constitution contains analogous provisions that limit forfeiture of estate.[213]

2. Criminal Forfeiture and the Massachusetts Common Law

It has been suggested that in Massachusetts forfeitures based on criminal status were prohibited long before the adoption of the constitution in 1780.[214] As early as 1641, the colonial authorities in Massachusetts had abolished forfeitures and other attendant circumstances to attainder in the *Body of Liberties*.[215] Indeed, decisions of the Supreme Judicial Court of Massachusetts have repeatedly referred to the *Body of Liberties* in general and to its rejection of criminal forfeiture in particular.[216] The limited Massachusetts case law dealing, at least tangentially, with the slayer issue likewise reflects an understanding of a limit to the allowable scope of forfeiture.[217]

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212. *See, e.g.*, *id.* at 1202 (majority opinion) (holding that, even absent a constitutional provision, the common law would not allow a statute to "work a forfeiture of a murderer's *preexisting* property interest as the result of his conviction" (emphasis in original)).

213. U.S. CONST. art. I, § 10 ("No State shall . . . pass any Bill of Attainder . . . ."); *id.* art. III, § 3, cl. 2 ("The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.").

214. *See* Cecil Greek, *supra* note 30, at 119 (suggesting that "Massachusetts abolished escheats and forfeiture consequent to attainder in its 'The Body of Liberties of 1641'"); THE BODY OF LIBERTIES OF THE MASSACHUSETS COLLONIE IN NEW ENGLAND (1641), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 46, 46-47 (Philip B. Kurland & Ralph Lerner eds., 1987). This document is considered by many to be the precursor to the General Laws of Massachusetts and the Massachusetts Constitution. GEORGE M. JARNIS & NICHOLAS S. RACHEOTES, THE MASSACHUSETTS CONSTITUTION: A CITIZEN'S GUIDE 6-8 (1987).

215. 1 NATHAN DANE, A GENERAL ABRIDGEMENT AND DIGEST OF AMERICAN LAW, WITH OCCASIONAL NOTES AND COMMENTS 147 (Boston, Cummings, Hilliard & Co. 1823) ("By a law passed in the colony of Massachusetts A.D. 1641, it was enacted, (among other things,) that there should be no forfeiture for, or upon death *judicial*.").

216. *See* Tyler v. Judges of the Court of Registration, 55 N.E. 812, 823 (Mass. 1900) ("Forfeiture of lands was, by the Body of Liberties of 1641, declared not to exist in the Colony of Massachusetts . . . ." (citing Commonwealth v. Mink, 123 Mass. 422, 425, 426 (1877))). In *Mink*, the court stated:

> In the Colony of Massachusetts, by the Body of Liberties of 1641, all lands and heritages were declared to be free . . . from all feudal burdens . . . and there has accordingly never been in Massachusetts any forfeiture upon one's death on conviction or suicide, unless under some particular statute creating the crime, of which no instance is remembered.

Mink, 123 Mass. at 426 (citations omitted).

217. The only two Massachusetts cases that deal with the slayer issue in any form are *Diamond v. Ganci*, 103 N.E.2d 716 (Mass. 1952), and *Slocum v. Metropolitan Life Insurance Co.*, 139 N.E. 816 (Mass. 1923).

In *Slocum v. Metropolitan Life Insurance Co.*,[218] the Supreme Judicial Court applied a common law slayer rule to bar a husband who had feloniously killed his wife from receiving the proceeds of her life insurance policy.[219] In dicta, the court noted that "[t]he same principle of public policy" that bars a slayer from collecting under an insurance contract would also "preclude[ ] him from claiming under the statute of descent and distribution."[220] To support its assertion, the court invoked the now-familiar common law maxim that no one should be permitted to profit from his own wrong.[221] The court further justified its conclusion by noting that the defendant could permissibly be deprived of property in which he possessed only an expectancy interest and "no vested right in the proceeds."[222] In the court's brief discussion of descent and distribution, it cited to two cases from other jurisdictions that also base their finding of constitutionality upon the owned interest rationale.[223] While the court did not ultimately consider constitutional issues in its decision, its concern for the vested character of property does imply a recognition of some limit on criminal forfeiture.[224]

This same concern about impermissible forfeiture is implied in the only other Massachusetts case dealing directly with the slayer issue.[225] In *Diamond v. Ganci*, a mortician sued a husband who had

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218. *Slocum*, 139 N.E. at 816.

219. *Id.* at 817 ("[A] person who commits murder, or any person claiming under him or her, . . . to benefit by his or her criminal act, would no doubt be contrary to public policy." (quoting Cleaver v. Mut. Reserve Fund Life Ass'n, 1 Q.B. 147, 152-53 (1892))).

220. *Id.* at 818.

221. *See id.* at 817.

222. *Id.* The court stated:

> In a policy which permits the insured to change the beneficiary, the latter has no vested interest in the money to be paid, but only an expectancy. It is clear from the terms of the present policy that Miller had no vested right in the proceeds as against the company.

Id. (citations omitted).

223. *Id.* (citing Perry v. Strawbridge, 108 S.W. 641, 643 (Mo. 1908) (holding that while forfeiture for conviction of a crime had been banned by the state constitution, the surviving husband never acquired an estate in this property, and therefore there was nothing upon which this constitutional provision could operate"); Box v. Lanier, 79 S.W. 1042, 1047 (Tenn. 1904) (holding that the lack of a vested interest in the property in question rendered inapplicable the state constitutional anti-forfeiture clause as well as "sections 9, 10, art. 1, of the federal Constitution")).

224. If wholesale forfeiture were indeed permissible by law, such a concern would be baseless.

225. *See* Diamond v. Ganci, 103 N.E.2d 716 (Mass. 1952).

killed his wife for the cost of the deceased wife's burial expenses.[226] At the time of the wife's death, her only asset was her interest in property held with her husband as a tenancy by the entirety.[227] Subsequent to killing his wife, the husband "signed an instrument purporting to be a trust" into which he transferred all the funds produced by a foreclosure sale of the jointly owned property.[228] In its analysis, the Supreme Judicial Court noted that determination of whether these assets were reachable by the mortician "depend[ed] upon the effect to be given the rule of public policy which prevents a murderer from profiting by his own wrong."[229] Acknowledging that the husband, as a tenant by the entirety, had a present interest in "'possession and control of the granted premises, together with the use and the profits therefrom'" that was vested under the original deed creating the tenancy,[230] the court held that "the *least* beneficial interest" that could be considered retained by the husband is his "life interest, *of which he would not have been deprived* by the principle under consideration."[231] Thus, the court explicitly recognized that forfeiture of a vested interest is beyond the scope of an equitable rule that seeks to prevent a person from profiting from his wrong.[232]

These statements of the Supreme Judicial Court seem, at a minimum, to evince a common law understanding that there are limits to the permissibility of forfeiture. It has been held that such a common law understanding, even absent a specific constitutional prohibition against forfeiture, is sufficient to preclude a slayer statute from requiring a surviving joint tenant to forfeit her vested interest in joint property.[233] In *Gallimore v. Washington*, the District of Columbia Court of Appeals reversed a trial court's construction of the applicable slayer statute.[234] The lower court had held that a murderous joint tenant was to be treated as if he had predeceased his victim—losing any interest in the property held jointly with the

226. *Id.* at 717.

227. *Id.*

228. *Id.*

229. *Id.* at 718.

230. *Id.* (quoting Franz v. Franz, 32 N.E.2d 205, 208 (Mass. 1941)).

231. *Id.* (emphasis added).

232. *Id.* The court approached forfeiture directly, noting that "[b]efore the wife's death the defendant had enjoyed a life interest with the exclusive right to rents and profits. *This he did not forfeit by the murder.*" *Id.* (emphasis added).

233. Gallimore v. Washington, 666 A.2d 1200 (D.C. 1995).

234. *Id.* (construing D.C. CODE § 19-320(a) (2001)).

decedent.[235] In doing so, the trial court was aware of and had distinguished an earlier decision in Maryland that found that such a result would violate that state's constitutional prohibition against criminal forfeiture.[236] The trial court stated that the Maryland precedent was inapplicable because "the District [of Columbia] has no such constitutional provision."[237]

Notwithstanding this absence, the Court of Appeals overturned, finding that, because such government action was prohibited at common law, the lack of any such constitutional or statutory provision did not indicate that forfeiture is "presumptively acceptable."[238] Associate Judge Schwelb, dissenting on other grounds, stressed that while there is universal acceptance of the maxim that one should not be permitted to profit from one's own wrong, another closely held maxim in the law, that "equity abhors forfeitures,"[239] belies any presumptive acceptability of a criminal forfeiture.[240] He added that "[s]tatutes or regulations which impose forfeitures . . . are penal in nature and must be strictly construed."[241]

Based on the reasoning in the *Gallimore* decision, it would seem that Massachusetts's lack of a specific constitutional provision prohibiting forfeitures does not completely insulate its slayer statute from attack.[242] The *Gallimore* court's ultimate refusal to give the District of Columbia's slayer statute that effect turned not on the use of state constitutional provisions to invalidate a statute, but rather on a finding that the statute, as written, did not abrogate the common law understanding that joint tenants have a vested interest in property held jointly.[243] The court reasoned that the statute's punitive effect, clear in light of this common law understanding, could not be considered reasonable absent equally clear punitive *intent* on the part of the legislature.[244] Since the court found no clear punitive intent either in the legislature or in the common law,

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235. *Id.* at 1202.

236. *See* Pannone v. McLaughlin, 377 A.2d 597, 602 (Md. Ct. Spec. App. 1977).

237. *Gallimore*, 666 A.2d at 1213 (Schwelb, J., dissenting).

238. *Id.* at 1208-09, 1213 (majority opinion).

239. *Id.* at 1213; *see also* Jones v. N.Y. Guar. & Indem. Co., 101 U.S. 622, 628 (1880) ("Equity abhors forfeitures.").

240. *Gallimore*, 666 A.2d at 1213 (Schwelb, J., dissenting on other grounds).

241. *Id.*

242. *Id.* ("The lack of any such constitutional or statutory provision does not mean . . . that a forfeiture is [a] presumptively acceptable remedy.").

243. *Id.* at 1202 (holding "that the common law, at least with respect to the current problem, is not displaced by the statute").

244. *Id.* at 1208-09.

the court construed the statute in part by imputing common law limitations on forfeiture notwithstanding the plain language of the statute.[245]

Like the court in *Gallimore*, the common law of Massachusetts suggests that criminal forfeiture of vested interests is an unreasonable and undesirable outcome of legislation.[246] Therefore, if the Massachusetts slayer statute cannot reasonably be construed as an intentional abrogation of the common law right of slayers to be free from punitive forfeitures,[247] it must not be given this effect.[248] However, the explicitness of the Massachusetts statute, its lack of conduciveness to creative construction, as well as the evidence suggesting that the legislature *did* in fact intend the statute to be punitive, may make this type of construction possible.

In sum, just as the unique nature of the Massachusetts slayer statute[249] would make it particularly vulnerable to claims of an unconstitutional forfeiture under the constitutions of a majority of states, the absence of an explicit provision forbidding criminal forfeitures in the Massachusetts Constitution[250] largely precludes the type of state constitutional attack most commonly mounted against slayer statutes—that they require impermissible forfeiture based solely on state constitutions and state laws.[251] Nonetheless, the statute's explicit attempt to cancel a slaying tenant's entire interest

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245. *Id.* at 1202.

246. *See* Diamond v. Ganci 103 N.E.2d 716, 718 (Mass. 1952); Slocum v. Metro. Life Ins. Co., 139 N.E. 816, 818 (Mass. 1923).

247. It is important to note that the legislature *has* passed statutes requiring forfeiture in limited circumstances. *See* MASS. GEN. LAWS ch. 94C, § 47 (2006). However, in these statutes the legislature has been unquestionably explicit so as to abrogate any common law understandings. *See id.* § 47(a) ("The following property shall be subject to forfeiture to the commonwealth and all property rights therein shall be in the commonwealth . . . .").

248. Wilson v. Grace, 173 N.E. 524, 528 (Mass. 1930) (noting that if a "statute is a complete reversal of the common law as understood in this commonwealth . . . it cannot be presumed that such a statute was intended to go beyond the purpose manifested by its words" (internal quotations omitted)). *See generally* 3 SINGER, *supra* note 164, § 61:2. While a statute may abolish a common law right, "there is a presumption that the legislature has no such purpose." *Id.* § 61:1. If such a right is to be taken away, "it must be noted clearly by the legislature." *Id.* Common law jurisdictions synchronize statutory law with common law rules and maxims. "In some cases the scope of the statute may be extended, and *in others reduced.*" 2B *id.* § 50:02 (emphasis added).

249. The Massachusetts slayer statute is unique both in its explicit language requiring forfeiture and the way in which this language evinces a punitive intent on the part of the legislature. *See supra* Part IV.

250. The Massachusetts Constitution is unique in its lack of an anti-forfeiture provision. *See* Fellows, *supra* note 102, at 539 n.147.

251. *Id.*

in a joint tenancy or tenancy by the entirety may make it vulnerable to constitutional attacks previously underutilized by those challenging slayer statutes.

3. Analysis of the Constitutionality of the Massachusetts Statute Based on Federal Constitutional Provisions

As discussed, the Federal Constitution contains provisions analogous to state constitutional bars against forfeiture.[252] While slayer statutes have most commonly been attacked on state constitutional grounds,[253] a number of cases have cited federal constitutional provisions as additionally limiting state power to pass slayer statutes that require forfeiture.[254] While a number of state courts have suggested in their holdings that federal constitutional provisions barring forfeiture and attainder might be applicable,[255] the United States Supreme Court has yet to consider an attack of state slayer rules based on federal constitutional principles barring forfeiture and attainder.[256] However, given that the vast majority of case law suggests that the Massachusetts statute, as drafted, would be presumptively unconstitutional under all analogous state constitutional prohibitions against forfeiture,[257] its susceptibility to attack under the Federal Constitution is high.

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252. U.S. CONST. art. I, § 10 ("No State shall . . . pass any Bill of Attainder . . . ."); *id.* art. III, § 3, cl. 2 ("The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.").

253. Fellows, *supra* note 102, at 538-39. This is most likely due to the fact that property law is governed by state rather than federal statute. *See* Egelhoff v. Egelhoff, 532 U.S. 141, 160 (2001) (Breyer, J., dissenting) (noting the state-unique nature of slayer statutes).

254. *E.g.*, Moore v. Moore, 168 S.E.2d 318, 320-21 (Ga. 1969) (considering federal provisions applicable though ultimately rejecting claims under them); Misenheimer v. Misenheimer, 325 S.E.2d 195, 198 (N.C. 1985) (citing U.S. CONST. art. I, § 10, cl. 1).

255. *See, e.g.*, State v. Lincoln, 49 N.H. 464, 469 (1870) (suggesting that the Federal Constitution is applicable in the area of forfeiture by stating that "in the United States generally, there can be no forfeiture of estate or goods, as a punishment for crime," despite the absence of an explicit constitutional prohibition against forfeiture in a state constitution); *Misenheimer*, 325 S.E.2d at 198 n.2.

256. Fellows, *supra* note 102, at 539 n.147.

257. Under the rationale expressed in the *Pannone* and *Shields* decisions for example, the Massachusetts statute would be unconstitutional per se in a jurisdiction that had such constitutional protection. *See* Shields v. Shields (*In re* Estate of Shields), 574 P.2d 229 (Kan. App. 1977), *aff'd*, 584 P.2d 139 (Kan. 1978); Pannone v. McLaughlin, 377 A.2d 597, 602 (Md. Ct. Spec. App. 1977); discussion *supra* notes 226-234 and accompanying text.

Federal constitutional prohibitions against attainder and forfeiture of estate, like those adopted by states, were adopted to prohibit punishment based solely on an individual's criminal status as a convicted felon rather than for the crime committed.[258] Given that the central organizing principle behind the slayer rule and slayer statutes generally is the equitable maxim that *wrongdoers* should be prevented from profiting from their own wrong, it would seem that all forfeitures resulting from application of such a rule must be based on criminal status—that is, status as wrongdoer—and are, therefore, unconstitutional.[259]

However, courts have not found all applications of slayer rules unconstitutional per se. In fact, in most cases, courts have found constitutional prohibitions inapposite to the application of slayer statutes by interpreting such statutes as nonpunitive and not resulting in a cognizable forfeiture of a vested property interest.[260] Again, utilization of the owned interest rationale addresses these potential federal constitutional vulnerabilities, not by arguing that application is not based on the status of the slayer but by holding that no punishment is being applied.[261] However, given the Massa-

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258. Fellows, *supra* note 102, at 544.

259. *Id.*

260. *See, e.g.*, Weaver v. Hollis, 22 So. 2d 525, 529 (Ala. 1945) ("The exclusion of the murderer from the property benefit *does not inflict upon him any greater or other punishment* for his crime than the law specifies, and *takes no property from him*." (emphasis added)); Moore v. Moore, 168 S.E.2d 318, 320 (Ga. 1969). In *Moore*, the court rejected

> the contention that a conviction of the crime of murder will automatically work a forfeiture of the right of the convicted person to inherit from the person killed[,] . . . the contention that the statute in question is void as being in violation of Art. I, Sec. X, Par. I of the Constitution of the United States . . . , or that it operates to deprive a murderer of his property without due process of law, or that that statute is in violation of the 14th Amendment to the Constitution of the United States of America . . . [or] the contention that a conviction in such a case would work corruption of blood or forfeiture of property in violation of Par. III, Sec. II, Art. I of the Constitution of the State of Georgia . . . . [because a]t the time of the death of the deceased in this case, the wife had no vested interest in his estate, upon which the constitutional prohibition against forfeiture could operate

Id. (citations omitted); Nat'l City Bank of Evansville v. Bledsoe, 144 N.E.2d 710, 716 (Ind. 1957). The *Bledsoe* court stated that

> Many states, including Indiana, have provided by statute that the murderer shall not inherit from his victim. These statutes would be unconstitutional if they imposed a forfeiture of property as a penalty for the murder. The statutes, however, have uniformly been upheld, since they merely prevent the murderer from profiting by his act.

Id.

261. *See Moore*, 168 S.E.2d at 320-21.

chusetts statute's explicit attempt to exact a criminal forfeiture from murderous joint tenants and tenants by the entirety[262] and the evidence of the legislature's punitive intent, such an interpretation is unavailable in the case of the Massachusetts slayer statute.

By its action, the Massachusetts legislature passed a law that requires a punitive forfeiture (takes away the vested property interests of surviving joint tenants and tenants by the entirety) based on that person's criminal status (having been convicted of killing a cotenant). This action falls squarely within the prohibition against a state passing any bill of attainder.[263] As such, the Massachusetts slayer statute violates the Federal Constitution.

B. *Twice Punished: The Uniquely Punitive Nature of the Massachusetts Statute Brings it Within the Purview of the Fifth Amendment Guarantee Against Double Jeopardy*

The Double Jeopardy Clause of the Fifth Amendment guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb."[264] This guarantee applies as against both federal and state legislation.[265] The Double Jeopardy Clause has been interpreted by the Supreme Court to provide criminal defendants protection against both reprosecution for the same offense after acquittal or conviction,[266] and multiple punishments for the same offense.[267] Double jeopardy challenges to slayer statutes are exceedingly rare, and no attack based on this clause has been successful.[268] This omission is attributable to the fact that,

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262. MASS. GEN. LAWS ch. 265, § 46 (2006).

263. *See* Pierce v. Carskadon, 83 U.S. (16 Wall.) 234, 239 (1873) ("[A state] act, in depriving the defendants for past misconduct, and without judicial trial, of an existing right, [is] subject to constitutional inhibition against the passage of bills of attainder."); *see also* U.S. CONST. art. I, § 10.

264. U.S. CONST. amend. V. The Supreme Court has held that the term "life or limb" is not to be considered literally but is to be construed to include fines and other punishments. *See* Jeffers v. United States, 432 U.S. 137, 155 (1977).

265. *See supra* note 190.

266. Ohio v. Johnson, 467 U.S. 493, 498 (1984) (The Double Jeopardy Clause "protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction." (internal quotation marks omitted) (quoting Brown v. Ohio, 432 U.S. 161, 165 (1977))).

267. *See* North Carolina v. Pearce, 395 U.S. 711, 728-29 (1969) (Douglas, J., dissenting) (noting that "[i]t is well established at an early date that the Fifth Amendment was designed to prevent an accused from running risk of 'double punishment'").

268. One case where such an argument was attempted is *In re* Estate of Congdon, 309 N.W.2d 261, 270 (Minn. 1970). In that case the double jeopardy charge was rejected because the proceeding governing the distribution of assets was not considered

whether by plain language[269] or by construction,[270] legislatures and courts have been emphatic in their insistence that slayer statutes are equitable rather than punitive measures and as such do not fulfill the conditions precedent to a double jeopardy charge.[271] However, because the Massachusetts slayer statute expressly requires a punitive criminal forfeiture of vested joint interests and is located within the criminal code, it is vulnerable to attack under the Double Jeopardy Clause of the Fifth Amendment in a way that other state statutes are not.

The first step in determining whether a statute violates the prohibition on double jeopardy is to determine whether it is punitive.[272] The Supreme Court has held that the Double Jeopardy Clause only bars the imposition of more than one punishment for the same offense if each punishment is criminal rather than civil in nature.[273] Determination of a statute's criminal or civil nature, in turn, is based on apparent legislative intent—whether express or implied—to establish a civil or criminal penalty or, in the alternative, a determination of "'whether the statutory scheme was so punitive either in purpose or effect' [so] as to 'transfor[m] what was clearly intended as a civil remedy into a criminal penalty.'"[274]

Determining legislative intent at the outset is "a matter of statutory construction."[275] What is absolutely clear from the plain language of the Massachusetts statute is that the legislature, at a minimum, intended to affect the interests of slayers in property, including property held jointly or by the entirety.[276] As discussed, the legislative history makes apparent that during the development of the statute, the legislature was aware that the statute would void

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punitive by the court. *Id.* The court noted that "[i]t is well established that the prohibition against double jeopardy does not preclude separate civil and criminal proceedings based on the same incident." *Id.*

269. *See supra* note 164, and accompanying text.

270. *See* Gallimore v. Washington, 666 A.2d 1200, 1208-09 (D.C. 1995) (refusing to impute a punitive intent to the legislature).

271. *See* Hudson v. United States, 522 U.S. 93, 99 (1997) (noting that the first step to establishing a double jeopardy claim is to determine that the legislature intended a punitive effect).

272. *Id.*

273. *Id.*

274. *Id.* (second alteration in original) (citation omitted) (quoting United States v. Ward, 448 U.S. 242, 248 (1980); Rex Trailer Co. v. United States, 350 U.S. 148, 154 (1956)).

275. *Id.*; *see also* Seling v. Young, 531 U.S. 250, 261 (2001) ("[W]hether an Act is civil or punitive in nature is initially a question of statutory construction." (citing Kansas v. Hendricks, 521 U.S. 346, 361 (1997))).

276. MASS. GEN. LAWS ch. 265, § 46 (2006); *see supra* Part IV.

vested joint property interests, resulting in a criminal forfeiture. In light of these facts, a reasonable construction of the slayer statute suggests that the legislature intended, if not expressly than certainly impliedly, for the statute to be punitive.[277] The inclusion of the statute in the state's criminal, rather than civil, code further bolsters the conclusion that the legislature intended to create a criminal penalty. There is, however, some competing evidence that the initial organizing principle behind the legislature's action was equitable.[278] Therefore it is necessary to extend the analysis beyond plain language to consider the statute's effect.

When, as here, there is some ambiguity as to whether the express or implied legislative intent was solely punitive, a statute that is "'so punitive either in purpose or *effect*'" will trigger double jeopardy protection.[279] In determining whether such a threshold has been crossed, the Supreme Court has suggested a list of factors to consider. They are:

> (1) "[w]hether the sanction involves an affirmative disability or restraint"; (2) "whether it has historically been regarded as a punishment"; (3) "whether it comes into play only on a finding of *scienter*"; (4) "whether its operation will promote the traditional aims of punishment—retribution and deterrence"; (5) "whether the behavior to which it applies is already a crime"; (6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and (7) "whether it appears excessive in relation to the alternative purpose assigned."[280]

Under these factors, the Massachusetts legislature's intent to punish becomes even clearer. Criminal forfeiture is clearly a sanction that amounts to an affirmative disability. Indeed it is one that has been regarded as punishment throughout history.[281] The statute's limit on the bar to succession to first- and second-degree mur-

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277. *See supra* Part IV.

278. *See* Cheryl A. Jacques, Senator, Commonwealth of Massachusetts, Fact Sheet, Amendment to House Bill 5136: An act Relative to the Descent and Distribution of Property (July 22, 2002) (on file with author) (noting that the legislation was proposed to prevent persons from profiting from their own wrong).

279. *Hudson*, 522 U.S. at 99 (emphasis added) (quoting United States v. Ward, 448 U.S. 242, 248-49 (1980)).

280. *Id.* at 99-100 (alteration in original) (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963)).

281. The penal nature of deprivation of property has been commented upon throughout the history of the slayer issue. *See, e.g.*, Gallimore v. Washington, 666 A.2d 1200 (D.C. 1995) (a recent case suggesting that forfeiture of the right to inherit would be a penalty); Wall v. Pfanschmidt, 106 N.E. 785, 789-90 (Ill. 1914) (an early case noting the same).

der and manslaughter, excluding vehicular homicide and negligent manslaughter, evinces the importance of a finding of scienter.[282] A forfeiture under such circumstances will clearly promote retribution and deterrence. As early as the seminal slayer case of *Riggs v. Palmer*, such goals were germane to preventing a slayer from inheriting.[283] The behavior that triggers the statute, unlawful killing, is certainly already a crime, perhaps the oldest crime.[284] For sure, an alternate purpose may be found in the equitable demands of preventing one from profiting from one's own wrong, but equity is poorly served, either conceptually or legally, through the type of punitive forfeiture demanded by the statute.[285] In overreaching the limits of equity, the Massachusetts statute drifts from civil forfeiture, which does not trigger double jeopardy scrutiny, into the realm of criminal forfeiture, which does.[286] In sum, the Massachusetts slayer statute is criminally punitive such that it triggers protections provided by the Double Jeopardy Clause.

Finally, these separate punishments for the same offense are being applied at separate judicial proceedings. The Supreme Court has held that multiple proceedings are required to trigger double

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282. A finding of scienter refers to a requirement that a given offense must be committed with a guilty mind. *See* BLACK's, *supra* note 193 (defining scienter as "1. A degree of knowledge that makes a person legally responsible for the consequences of his or her act or omission; the fact of an act's having been done knowingly, esp. as a ground for civil damages or criminal punishment"). Such a mens rea requirement is common in statutes that are criminal in nature. *See* Morissette v. United States, 342 U.S. 246 (1952) (noting that due to the importance of mens rea to our criminal justice system, courts apply a presumption against strict liability in such cases). Each underlying offense triggering liability under the Massachusetts slayer statute requires a finding of scienter. *See* Commonwealth v. Sires, 596 N.E.2d 1018, 1021-22 (Mass. 1992) (instructing the jury that indictment on either first or second degree murder requires a showing that a killing was carried out with malice); Commonwealth v. Bouvier, 55 N.E.2d 913, 916-17 (Mass. 1944) (holding that some level of intent is required to support a manslaughter charge).

283. Kathleen Reilly, *Making a Killing in Real Estate: Solving the Mystery of Murder's Effect on Tenancy by the Entirety in New York—A Legislative Solution*, 82 ST. JOHN'S L. REV. 1203, 1231 (2008) ("The *Riggs* principle was originally adopted to prevent a killer motivated by greed from achieving his goal and profiting through his crime. The killer was denied all interest in the property for reasons of deterrence.").

284. MASS. GEN. LAWS ch. 265, § 1 (2006).

285. *See Gallimore*, 666 A.2d at 1213 (Schwelb, J., dissenting) ("[E]quity abhors forfeitures.").

286. *See* United States v. Ursery, 518 U.S. 267, 292 (1996) (holding that "in rem civil forfeitures are neither 'punishment' nor criminal for purposes of the Double Jeopardy Clause"); United States v. One Assortment of 89 Firearms, 465 U.S. 354, 362 (1984) ("The question, then, is whether a . . . forfeiture proceeding is intended to be, or by its nature necessarily is, criminal and punitive, or civil and remedial.").

jeopardy protection.[287] This requirement is satisfied in the case of the statute at issue. Punishment for violation of the Massachusetts murder statute attaches at the conclusion of the criminal trial.[288] Punishment, in the form of forfeiture under the slayer statute, takes place in a later probate proceeding.[289]

The Massachusetts slayer statute, due to its uniquely punitive nature, is an additional criminal punishment, based on the same offense as the underlying violations, that is applied in a separate proceeding. As such, it is offensive to the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution.

CONCLUSION

The Massachusetts slayer statute requires redrafting. The current statute demands an unconstitutional forfeiture in violation of the United States Constitution and, potentially, the Massachusetts Constitution, as well as Massachusetts common law. Additionally, application of the statute as drafted violates the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution. These infirmities can be clearly traced to the Massachusetts legislature's explicit application of the "predeceased the decedent" fiction to joint property interests with a right of survivorship. Generally, slayer statutes meet the very real equitable demand that "a wrongdoer be prevented from profiting from his wrong" and, as such, play an important jurisprudential role. This equitable end is poorly served, however, by the current Massachusetts statute.

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287. Hudson v. United States, 522 U.S. 93, 99 (1997) (noting that the Double Jeopardy Clause bars multiple prosecutions and punishments for a single crime, "only when such occurs in successive proceedings"); Missouri v. Hunter, 459 U.S. 359, 365-66 (1983).

288. *See* MASS. R. CRIM. P. 28.

289. Massachusetts requires a form to accompany a petition for appointment when a death certificate states that the cause of death was suicide, homicide, could not be determined, or is still pending further investigation. *See* Massachusetts General Probate Court Form CJ-P 50, *available at* http://pcpfc.com/webforms/AffofCause.pdf (last visited Mar. 15, 2009).